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IN THE

Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.,

Petitioners,

v.

KAREN PACHECO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law severely restricting the use of arbitration in agreements between patients and health care providers, and which concededly would be preempted under the Federal Arbitration Act, 9 U.S.C. § 2, is saved from preemption because it is "for the purpose of regulating the business of insurance" under section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6 of the Rule of this Court, petitioners state that petitioner Colorado Permanente Medical Group, P.C., is a Colorado Corporation that does not have a parent or any publicly held corporation that owns 10% or more of its stock.

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OPINIONS BELOW

The order of the trial court granting petitioners' motion to compel arbitration is unpublished, and is reproduced in the appendix (Pet. App.) at 45a-48a. The order of the trial court denying respondent's motion to vacate the arbitration award is unpublished, and is reproduced at Pet. App. 34a. The opinion of the Colorado Court of Appeals is reported at 55 P.3d 141 (Colo. App. 2001) and is reprinted as reported at Pet. App. 29a-33a. The opinion of the Colorado Supreme Court is reported at 71 P.3d 375 (Colo. 2003), and is reprinted as reported at Pet. App. 1a-28a. The order of the Colorado Supreme Court denying rehearing is unpublished, and is reproduced at Pet. App. 49a.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on June 9, 2003. An order denying rehearing was entered on June 30, 2003. On September 16, 2003, Justice Breyer extended the time for filing the petition to and including October 28, 2003. This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

The statutory provisions involved are section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012, section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, and section 13-64-403 of the Colorado Health Care Availability Act ("HCAA"), Colo. Rev. Stat. § 13-64-403. Each is set forth in the appendix at Pet. App. 50a-55a.

STATEMENT OF THE CASE

This petition raises an unresolved and recurring issue of national importance regarding the applicable principles for

determining when a state law and, in particular, a law restricting arbitration, is saved from federal preemption under the first clause of section 2(b) of the McCarran-Ferguson Act.

Statutory Background

1. Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in 1925 to reverse the trend of judicial and state hostility toward arbitration agreements and to establish a broad federal policy favoring the use of arbitration to resolve legal disputes. See generally *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Of particular relevance to this case is section 2 of the FAA, which states that written agreements to submit disputes to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 thus preempts state laws that impose requirements on arbitration agreements that are not also imposed on contracts generally. *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996).

2. Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1012 (see Pet. App. 50a-51a), in 1945 in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In *South-Eastern*, this Court held that the insurance industry was subject to Congress's power to regulate under the Commerce Clause. U.S. Const. art. I, § 8. By passing the McCarran-Ferguson Act, Congress preserved the states' preeminent authority by exempting the business of insurance from regulation pursuant to federal laws of general applicability. See generally *SEC* v. *National Sec., Inc.*, 393 U.S. 453 (1969). The first clause of section 2(b) of the McCarran-Ferguson Act applies to federal laws that are not specifically directed to the business of insurance, and bars preemption by such laws when preemption would "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). The second

clause of the McCarran-Ferguson Act applies to the federal antitrust laws, and specifies that those laws are "applicable to the business of insurance to the extent that such business is not regulated by State law." *Id.*

3. Colorado enacted the Colorado Health Care Availability Act ("HCAA"), Colo. Rev. Stat. § 13-64-403 (see Pet. App. 51a-55a), in 1988 as a tort reform measure aimed at medical malpractice cases. The section of the HCAA at issue in this case, section 13-64-403, is included in Part 4 of the HCAA, entitled "Procedures and Evidence in Medical Malpractice Actions." The Colorado Legislature's stated "intent" in passing section 13-64-403 is to ensure "that an arbitration agreement be a voluntary agreement between a patient and a health care provider and no medical malpractice insurer shall require a health care provider to utilize arbitration agreements as a condition of providing medical malpractice insurance to such health care provider." See *id.* § 13-64-403(1). The remaining eleven subsections of section 13-64-403 each impose or define conditions that affect the enforceability of arbitration agreements between patients and "health care providers." "Health care providers" are defined (in subsection 12) to include persons (including corporations) licensed to deliver health care and facilities that deliver health care. *Id.* § 13-64-403(12).

Subsections 3 and 4 are also directly relevant here. These specify in detail, *inter alia*, the font-size, typeface, position within the contract, and language that an arbitration agreement between a patient and a health care provider must contain in order to be enforceable. *Id.* § 13-64-403(3), (4). It is undisputed that the arbitration agreement at issue here did not meet these requirements, and that the FAA, if applicable, prohibits their enforcement.

Proceedings Below

1. Respondent Karen Pacheco brought this wrongful death action against her deceased husband's health care

providers, including petitioners Dr. Michael Miller, Dr. Timothy Collins, Dr. Lawrence Allen and the Colorado Permanente Medical Group ("CPMG"), which was the physicians' employer. She alleged that petitioners were negligent in diagnosing and treating her husband, Mark Pacheco. Mr. Pacheco received medical services from CPMG through his health care coverage with Kaiser Foundation Health Plan of Colorado ("Health Plan").[1] Health Plan contracted with CPMG to provide medical services to Health Plans' enrollees.

Mr. Pacheco's "Group Medical And Hospital Service Agreement" with Health Plan provides for binding arbitration of medical malpractice claims. In response to Ms. Pacheco's action, petitioners moved to compel arbitration in accordance with that agreement. Ms. Pacheco objected, arguing that the arbitration clause was unenforceable because it violated the HCAA's formatting and language requirements. In response to petitioners' claim that the FAA preempted these requirements, Ms. Pacheco maintained that they were saved from preemption because they were enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

2. The trial court granted the motion to compel arbitration. The court observed that the arbitration provision in Mr. Pacheco's agreement did not comply with the arbitration-specific requirements of the HCAA, but held that the agreement was nonetheless enforceable because the FAA preempts those restrictions. Pet. App. 46a-47a (citing *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996)). In reaching that conclusion, the trial court rejected Ms.

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[1] Health Plan is a Colorado nonprofit corporation, which operates principally as a group practice prepaid health plan. It is licensed by the Colorado Division of Insurance as a health maintenance organization under the Colorado Health Care Coverage Act.

Pacheco's argument that the McCarran-Ferguson Act saved the HCAA requirements from FAA preemption. *Id.* at 47a.

The trial court looked to the three-factor test set forth in *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 129 (1982), to determine whether conduct that is regulated by state law constitutes the business of insurance under McCarran-Ferguson. In *Pireno*, this Court considered whether the conduct at issue: (1) has the effect of transferring or spreading a policyholder's risk; (2) is an integral part of the relationship between the policy holder and the insured; and (3) is limited to entities within the insurance industry. *Id.* at 129. Without commenting on the first and second factors, the trial court held that the HCAA "manifestly does not meet the third part of the test because the practice regulated by the statute is not limited to entities within the insurance industry; rather the statute applies to 'health care providers.'" Pet. App. 47a; see *id.* (stating that the HCAA is a "tort reform statute" that "generally applies to 'health care providers,' not to insurance companies"). The trial court concluded that "Kaiser may be an insurer as well as a health care provider, but the statute applies to all health care providers, not just health maintenance organizations; thus the statute does not regulate the business of insurance." *Id.*

3. The matter proceeded to arbitration, and the arbitrator ruled in favor of petitioners. Pet. App. 35a-44a. Ms. Pacheco moved to vacate the decision; the trial court denied the motion; and Ms. Pacheco appealed. *Id.* at 34a. The Colorado Court of Appeals reversed, holding that the arbitration agreement was unenforceable against Ms. Pacheco because only her husband was a party to the arbitration agreement. *Id.* at 29a-33a. Petitioners then sought review in the Colorado Supreme Court.

4. Having already noted the "importan[ce]" of deciding whether the HCAA's arbitration-specific requirements were preempted by the FAA in an earlier decision where it could not reach that issue, see *Colorado Permanente Med. Group,*

P.C. v. *Evans*, 926 P.2d 1218, 1229 (Colo. 1996), the Colorado Supreme Court granted review. The supreme court rejected the court of appeals' conclusion that the agreement does not apply to Ms. Pacheco, and then turned to the preemption issues. Pet. App. 11a.

The Colorado Supreme Court first held that the HCAA's arbitration restrictions "clearly conflict" with the FAA. Pet. App. 12a. Unless the HCAA were otherwise saved from preemption, the FAA would bar its enforcement in this case. *Id.* at 12a-13a (citing this Court's decision in *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996)).

The Colorado Supreme Court then addressed the "critical issue" of "whether the McCarran-Ferguson Act 'reverse-preempts' the FAA preemption of the HCAA arbitration regulations." Pet. App. 13a. That issue, in turn, required the court to determine whether the HCAA was enacted "'for the purpose of regulating the business of insurance.'" *Id.* (citing 15 U.S.C. § 1012(b)).

For guidance, the Colorado Supreme Court looked to this Court's decisions in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969) and *United States Department of Treasury* v. *Fabe*, 508 U.S. 491 (1993). Building on language from the opinions in those cases, the court below concluded that state statutes may be deemed to be "for the purpose of regulating the business of insurance" if they "directly regulate contracts between insurance policyholders and their insurers," and if they "'further the interests of these policyholders.'" Pet. App. 15a-16a. Applying this test, the court held that the HCAA directly "regulat[es] health insurance contracts drafted by the health care provider," that "HMOs simultaneously function as health care providers and health care insurers," and that by imposing typeface, language, and other requirements, the HCAA "protect[s] patients who are insured by that provider." *Id.* at 16a & n.9.

The court expressly declined to consider the *Pireno* factors that had guided the trial court. Pet. App. 14a n.8. Relying on this Court's decisions in *Fabe* and *Kentucky Ass'n of Health Plans, Inc.* v. *Miller*, 538 U.S. ___, 123 S. Ct. 1471 (2003), the majority below stated that the *Pireno* factors arose in the antitrust context governed by the "*second clause* of section 1012(b)," and thus "do not apply directly to the broader issue, under the *first clause* of section 1012(b), of whether a state law has been enacted for the 'purpose of regulating the business of insurance.'" Pet. App. 14a n.8.

The Colorado Supreme Court also rejected petitioners' argument that the HCAA was similar to arbitration-restriction statutes of general applicability, which other courts have declined to preserve under the McCarran-Ferguson Act. Pet. App. 12a. The court distinguished those cases, stating that "[t]he Colorado HCAA is not a statute of general applicability because it targets only arbitration agreements contained in medical services contracts." *Id.* The court did not explain why the HCAA's limited applicability to "medical services contracts" was sufficient to distinguish it from a statute of general applicability for purposes of McCarran-Ferguson. Instead, the court merely opined that "[a]s long as the statute is not one of general applicability, it is not necessary that the state statute relate only to insurance or that the statute be in the form of an insurance code." *Id.* at 17a.

Justice Kourlis, joined by Justice Bender, dissented. The dissenting justices agreed with the majority that under *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996), the FAA would preempt the HCAA. Pet App. 21a-22a. The dissent disagreed, however, with the majority's conclusion that the HCAA should be saved as a law for the purpose of regulating the business of insurance. *Id.* at 22a-28a.

In determining the purpose of the HCAA, the dissent (like the trial court) first considered the *Pireno* factors. Pet. App. 24a-26a. The dissent observed that "to the extent" *Pireno* applies, the "HCAA provisions at issue are not 'integral to the

policy relationship between' the medical service provider and its insurer, nor do they regulate, constrain, set benefits, exclusions or limitations that [a]ffect the relationship between the insurer and the policyholders." *Id.* at 26a.

Apart from *Pireno*, the dissent noted that several other courts had held that the McCarran-Ferguson Act does not save statutes of general application that restricted arbitration from preemption. Pet. App. 26a-27a. The dissent reasoned that the same result is appropriate for the HCAA. *Id.* at 27a. Like the statutes in those other cases, the HCAA does not apply "specifically to the relationship between insurers and their insureds," and therefore should be treated as a "law of general application, and thus not subject to the McCarran-Ferguson savings clause." *Id.*

Finally, the dissent observed that the majority's "interpretation" of section 2(b) as covering any law that "furthers the interests of policyholders" was too "broad." Pet. App. 28a. It would effectively encompass any state law that affects the size of "insurance premiums," for example, such as laws affecting the use of "seat belts" or "helmets," that have no meaningful connection to the business of insurance. *Id.*

The petitioners sought rehearing, which the Court denied en banc on June 30, 2003. Pet. App. 49a. Justices Kourlis and Bender voted to grant the petition for rehearing. *Id.*

REASONS FOR GRANTING THE PETITION

At the heart of this case is a very real, but unwarranted, collision between two important federal statutes: the FAA, which favors arbitration, and the McCarran-Ferguson Act, which favors state regulation of insurance matters. The FAA embodies Congress's intent to ensure that arbitration is available free from legal restraints that manifest the age-old judicial and state hostility to arbitration. See, *e.g.*, *Gilmer*, 500 U.S. at 24-25; *Dean Witter Reynolds Inc.* v. *Byrd*, 470

U.S. 213, 219-20 (1985). This Court has thus repeatedly held that the FAA preempts state laws that uniquely restrict the enforcement of agreements to arbitrate. *E.g.*, *Doctor's Assocs.*, 517 U.S. at 686-87; *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-16 (1984).

The arbitration restrictions in Colorado's HCAA unquestionably violate the FAA. Indeed, by dictating specific language requirements, as well as imposing font, typeface, and positioning requirements, the HCAA is even more restrictive than the Montana law that this Court in *Doctor's Associates* held was preempted by the FAA. Nevertheless, a growing number of state and federal courts have now construed the McCarran-Ferguson Act to permit states to enforce anti-arbitration laws forbidden by the FAA, so long as those restrictions are aimed at agreements involving insurers.

The decision below starkly illustrates the conflicts and confusion that characterize the lower courts' efforts to reconcile the FAA with section 2(b) of the McCarran-Ferguson Act. The Colorado Supreme Court upheld the HCAA's restrictions by refusing even to consider the guidance that application of the *Pireno* factors would have provided. Instead, the court derived a new test that considers whether state laws "directly regulate contracts between health insurance policyholders and their insurers" and "further the interests of these policyholders." Pet. App. 15a-16a. This new test bears no discernable relationship to the plain language of section 2(b). Its adoption exacerbates the conflicts and confusion that already exist in the lower courts over the proper approach to construing section 2(b). And the breadth of the holding below alone warrants review, for as the dissenting Justices below aptly observed, the majority's approach "sweeps with a broad and wide arc that could swallow federal preemption under the Supremacy Clause." *Id.* at 28a.

Review is warranted in particular first to resolve the conflict over the extent to which section 2(b) applies to

statutes that are not specifically directed at insurers but are aimed at some other group, such as (in this case) "health care providers." See Colo. Rev. Stat. § 13-64-403(1), (12). As the dissenting Justices recognized, there is no meaningful difference between the HCAA and restrictive arbitration statutes of general applicability that other courts have not saved from FAA preemption under the McCarran-Ferguson Act. Pet. App. 27a; *American Bankers Ins. Co. of Fla.* v. *Crawford*, 757 So. 2d 1125, 1136 (Ala. 1999); *Hart* v. *Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971); *Hamilton Life Ins. Co. of N.Y.* v. *Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (2d Cir. 1969). Statutes of general applicability share with the HCAA the characteristics of both applying to insurers and not being specifically directed toward them. It is arbitrary for section 2(b) to preserve the HCAA and not these other statutes, and the Court should resolve that conflict.

Review is also warranted to resolve the acknowledged conflict in the lower courts over the role that the *Pireno* factors should play in cases arising under the first clause of section 2(b). Among federal courts, for example, panels in the Third, Seventh, and Eighth Circuits, like the court below, have expressly refused to consider the *Pireno* factors in cases under the first clause. By contrast, the Fifth, Ninth, Tenth, and Eleventh Circuits continue to be guided by them.

Furthermore, those courts that have considered the *Pireno* factors in FAA cases under the first clause are divided as to how to apply them to arbitration. A number of courts have concluded that statutes restricting arbitration satisfy each of the *Pireno* factors. *E.g.*, *Standard Sec. Life Ins. Co. of N.Y.* v. *West*, 267 F.3d 821, 823-24 (8th Cir. 2001) (per curiam); *Mutual Reinsurance Bureau* v. *Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933 (10th Cir. 1992); *Continental Ins. Co.* v. *Equity Residential Props. Trust*, 565 S.E.2d 603, 605 (Ga. Ct. App. 2002); *Cox* v. *Woodmen of the World Ins. Co.*, 556 S.E.2d 397, 400-02 (S.C. Ct. App. 2001). The California courts, while agreeing that arbitration restrictions address an

"integral" aspect of the insurer-insured relationship nevertheless acknowledge that these restrictions do not spread risk. *E.g. Smith* v. *PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal. App. 4th 139, 161 (2002), *cert. denied*, 537 U.S. 818 (2002); *Imbler* v. *PacifiCare of Cal., Inc.*, 103 Cal. App. 4th 567, 576 (2002).

In contrast, however, the Alabama Supreme Court, applying *Pireno*, has concluded that arbitration restrictions do not constitute the business of insurance. See *Crawford*, 757 So. 2d at 1133. The Alabama Supreme Court has determined, in particular, that arbitration restrictions have no substantial effect upon risk-spreading, and are no more integral to the insurer-insured relationship, or to the performance of an agreement, than are other contractual terms, such as the choice of law or the rules of contract interpretation, that are material to any contract dispute. They thus have no particular nexus to the distinctive attributes of the business of insurance. *Id.* Had the court below followed the *Pireno* analysis of the Alabama Supreme Court, it would have held the HCAA preempted by the FAA.

The confusion over the proper standard in cases under the first clause of section 2(b) reflects, in significant measure, uncertainty over *Pireno* created by this Court's decision in *Fabe*, and compounded by last Term's decision in *Kentucky Association*. In *Fabe*, this Court both distinguished the *Pireno* factors as involving the second clause of section 2(b), and yet employed them at length to evaluate the Ohio insurance insolvency statute. *Kentucky Association* announced a "clean break" from the *Pireno* factors in cases involving ERISA's savings clause, and identified problems with applying the *Pireno* factors to "state law" rather than to "*conduct*." 123 S.Ct. at 1478-79. Because the first clause of section 2(b) also refers to state laws, the majority below construed *Kentucky Association* as license to ignore the *Pireno* factors in the cases under the first clause of section 2(b) of the McCarran-Ferguson Act as well.

In *Kentucky Association*, however, this Court filled the gap created by the abandonment of *Pireno* with two significant requirements: to be a law that "'regulates insurance'" a law must be "specifically directed" toward insurers and must "substantially affect the risk pooling arrangement between the insurer and the insured." *Id.* at 1479.

Here, by contrast, the Colorado Supreme Court jettisoned *Pireno* while adopting a test that lacks any meaningful nexus to those aspects of the business of insurance that distinguish it from other businesses. It set forth a new test so broad that, as the dissent noted, it would cover any state law that affected insurance premiums. Pet. App. 28a. It therefore saved from preemption a state law that would not meet either of the two requirements adopted in *Kentucky Association*, or the three factors in *Pireno*. If the lower courts may properly ignore all consideration of the *Pireno* factors in cases involving the first clause of section 2(b), they should do so only at the direction of this Court, and only with sufficient guidance to ensure that they do not apply standards that effectively "swallow federal preemption." *Id.*

This case is a particularly good vehicle for the Court to use in resolving the conflicts over the use of *Pireno* and the applicability of section 2(b) to state arbitration restrictions. The decision below adopts a standard that not only permits the states to single out the insurance industry as an "FAA-free" zone, but saves statutes not even specifically directed at insurers. It thus gives free reign in a major industry sector to the very judicial and legislative hostility to arbitration that motivated the passage of the FAA. The lower court's grant of effectively unlimited power to the states to restrict the use of arbitration by insurers warrants review by this Court, especially because the standard governing section 2(b) of the McCarran-Ferguson Act is so unsettled.

REVIEW IS WARRANTED TO SETTLE THE TEST FOR DETERMINING WHEN A STATE LAW IS ENACTED "FOR THE PURPOSE OF REGULATING THE BUSINESS OF INSURANCE."

This Court should grant the petition to settle the proper test for determining when a state law is enacted "for the purpose of regulating the business of insurance" under the first clause of section 2(b) of the McCarran-Ferguson Act. The confusion in the lower courts over how to apply the terms of section 2(b) to state laws is rampant. The majority's analysis below illustrates, and exacerbates, that confusion in three significant respects.

1. First, the decision below conflicts with cases that refuse to save from FAA preemption those state laws that restrict the use of arbitration in insurance agreements but are not specifically directed at insurers. Pet. App. 26a-27a; see *Crawford*, 757 So. 2d at 1133; *Hart*, 453 F.2d at 1360; *Hamilton*, 408 F.2d at 611. In each of these cases, the state statutes at issue were statutes of general applicability that restricted the use of arbitration in insurance contracts. None of the state statutes at issue had specifically directed its restrictions at the insurance industry, and so the Alabama Supreme Court, and the Second and Tenth Circuits, each refused to apply the McCarran-Ferguson Act to "reverse preempt" the FAA. *Crawford*, 757 So. 2d at 1133; *Hart*, 453 F.2d at 1360; *Hamilton*, 408 F.2d at 611.

The majority below attempted to distinguish these cases on the ground that the HCAA is not a generally applicable statute, but one that targets "medical services contracts." Pet. App. 12a. That is not a meaningful distinction. Like statutes of general applicability, a statute that targets "medical services contracts" applies to, but is not specifically directed at, insurers. Such a statute therefore should not be deemed to have been enacted for the purpose of regulating insurers. The decisions in *Crawford*, *Hart* and *Hamilton* each stand for the

proposition that even a direct and foreseeable impact of a state law on the terms of an insurance policy is not enough to bring that state statute within the scope of section 2(b) of the McCarran-Ferguson Act. As the dissent recognized, *id.* at 27a-28a, those cases should have controlled the decision here.

The Colorado Supreme Court's decision is also inconsistent with the "common-sense" approach that this Court has adopted in the context of determining whether a law "'regulates insurance'" under ERISA's savings clause. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 740 (1985); *Kentucky Ass'n*, 123 S. Ct. at 1475-76; *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 365-66 (2002); *UNUM Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358, 367 (1999). In ERISA cases, the Court has explained that a law that regulates insurance "'must not just have an impact on the insurance industry, but must be specifically directed toward that industry.'" *Rush Prudential HMO*, 536 U.S. at 365-66; see *Kentucky Ass'n*, 123 S.Ct. at 1476. Using that approach, the Court has held that ERISA saves state insurance statutes that are specifically directed at HMOs in their capacity as the functional equivalent of insurers. *Rush Prudential HMO*, 536 U.S. at 367-73.

The converse applies here. As the trial court recognized, when a state statute is specifically directed not at HMOs as insurers, but at all health care *providers*, common sense compels the conclusion that the state law was not enacted for the purpose of regulating insurers. Indeed, because section 2(b) of the McCarran-Ferguson Act (unlike ERISA) expressly focuses on the "purpose" of the state statute, it is all the more important for any test that purports to implement section 2(b) to incorporate some common-sense assessment of whether the statute was specifically directed at insurers. Yet the Colorado Supreme Court's newly minted test entirely fails to do this. For this reason alone, the Court should grant review.

2. Second, and equally important, the decision below underscores the urgent need for this Court to resolve the

conflicts and confusion in the lower courts over whether and how to apply the *Pireno* factors in cases involving the first clause of section 2(b).

Like the majority below, panels in the Third, Seventh, and Eighth Circuits have concluded that *Pireno* applies only to antitrust cases under the second clause of section 2(b), and is inapplicable to cases under the first clause. In so holding, these cases point to this Court's acknowledgment in *Fabe*, 508 U.S. at 504, that the *Pireno* factors arose in a case construing whether "conduct" constituted the "'business of insurance'" under the second clause of section 2(b). See, *e.g.*, *Highmark, Inc.* v. *UPMC Health Plan, Inc.*, 276 F.3d 160, 167 n.1 (3d Cir. 2001) (stating that *Fabe*'s distinction between the first and second clauses of section 2(b) "makes it difficult, if not impossible, to apply *Pireno*" to determine whether the first clause of section 2(b) prevented the Lanham Act from preempting a state law prohibiting deceptive and false insurance claims); *Autry* v. *Northwest Premium Servs., Inc.*, 144 F.3d 1037, 1041-42 (7th Cir. 1998) (declining to apply *Pireno* to determine whether an Illinois statute governing premium finance agreements was saved from preemption by TILA under the McCarran-Ferguson Act); *Doe* v. *Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1305 n.8 (8th Cir. 1997) (declining to apply *Pireno* to determine whether RICO preempted a state insurance statute, because the *Pireno* factors are "relevant only in cases involving a conflict between state law and federal antitrust law").

Many other courts, however, have concluded that the *Pireno* factors should be considered in cases arising under the first clause. These cases typically point to the extended analysis of the *Pireno* factors that supports the holding in *Fabe*, and to the use of the phrase "the business of insurance" in both clauses of section 2(b). See, *e.g.*, *Munich Am. Reinsurance Co.* v. *Crawford*, 141 F.3d 585, 592 (5th Cir. 1998) (applying *Pireno* to determine that a state insurance insolvency statute regulates the business of insurance, and

was saved from preemption under section 2(b)); *Owensboro Nat'l Bank* v. *Stephens*, 44 F.3d 388, 391-92 (6th Cir. 1994) (holding that the *Pireno* factors are relevant in non-antitrust McCarran-Ferguson Act cases because *Fabe* "did not give 'business of insurance' one meaning in the first clause and a different meaning in the second"); *Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486, 1490 & n.2 (9th Cir. 1995) (expressly holding that the *Pireno* factors are applicable in first clause McCarran-Ferguson Act cases after *Fabe*); *Blackfeet Nat'l Bank* v. *Nelson*, 171 F.3d 1237, 1246 n.13 (11th Cir. 1999) (holding that the *Pireno* factors are appropriately applied to determine whether conduct constitutes the business of insurance under the first clause of McCarran-Ferguson); *Sabo* v. *Metropolitan Life Ins. Co.*, 137 F.3d 185, 191 (3d Cir. 1998) (applying *Pireno* factors, and noting that while *Pireno* "was directed to the antitrust clause in section 1012(b), it may nevertheless provide guidance in a more generalized analysis under this Act").

The confusion over the applicability of the *Pireno* factors is well-recognized in the lower courts. The Seventh Circuit has "confess[ed] some uncertainty as to whether *Fabe* counsels us to employ the *Pireno* test in cases involving the first clause of § 2(b)," and has noted that "[m]any other courts have struggled with the same question." *Autry*, 144 F.3d at 1044 n.5.[2] Panels in the Third and Seventh Circuits have recently

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[2] *See also Sabo*, 137 F.3d at 191 n.3 ("Some courts have concluded that this three part [*Pireno*] test is simply not relevant in determining what constitutes the business of insurance in a non-antitrust context. We disagree." (citation omitted)); *Imbler*, 103 Cal. App. 4th at 576 ("[I]t is unclear whether the *Pireno* three-prong test applies in [the non-antitrust] context."); *Ambrose* v. *Blue Cross & Blue Shield of Va., Inc.*, 891 F. Supp. 1153, 1160 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996) (table); *cf.* Peter B. Steffen, *After* Fabe: *Applying the* Pireno *Definition of "Business of Insurance" In First-Clause McCarran-Ferguson Act Cases*, 2000 U. Chi. Legal F. 447, 463 (noting that after *Fabe*, lower courts have struggled to determine "whether they should completely disregard the *Pireno* test in first-clause cases.").

decided not to follow prior panel decisions applying the *Pireno* factors, while a recent Eighth Circuit panel applied *Pireno* even though an earlier panel held that *Pireno* applied only to cases under section 2(b)'s second clause.[3] The confusion also has manifested itself, in some instances, as a dispute over whether courts should apply a "three-factor" or a "four-factor" test. As a practical matter, the real issue in these first-clause cases is whether the *Pireno* factors guide the court's evaluation of state law.[4]

The confusion and conflicts further extend to the issue of how *Pireno* should apply to arbitration statutes. Applying *Pireno*, several courts have concluded that arbitration statutes targeting the insurance industry regulate the business of insurance. See, *e.g.*, *West*, 267 F.3d at 823-24; *Great Plains*, 969 F.2d at 933-34; *Smith*, 93 Cal. App. 4th at 161; *Continental Ins. Co.*, 565 S.E.2d at 605; *Cox*, 556 S.E.2d at 400-02. In contrast, the Alabama Supreme Court's decision in *Crawford* demonstrates that faithful application of the *Pireno* factors to state statutes restricting arbitration compels the conclusion that such restrictions do not regulate the

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[3] *See Autry*, 144 F.3d at 1042 n.3 (declining to follow *American Deposit Corp.* v. *Schacht*, 84 F.3d 834 (7th Cir. 1996), which had held application of *Pireno* is "not . . . inappropriate" (*see* 84 F.3d at 840) in cases under the first clause); *Highmark*, 276 F.3d at 167 n.1 (effectively failing to follow *Sabo*, 137 F.3d at 191, by refusing to apply *Pireno* in a first clause case); *West*, 267 F.3d at 823-24 (applying *Pireno* notwithstanding prior panel decision, in *Norwest Bank*, 107 F.3d at 1305 n.8, holding that *Pireno* factors are relevant only in second clause cases).

[4] *Compare, e.g.*, *Autry*, 144 F.3d at 1040-42 (endorsing a "three part" test and refusing to apply *Pireno*), *and Norwest Bank*, 107 F.3d at 1305 & n.8 (adopting a three-factor test and declining to apply *Pireno* in light of *Fabe*), *with, e.g.*, *Sabo*, 137 F.3d at 189 & n.2 (utilizing a four-factor test, in which the first factor requires the court to apply the *Pireno* factors to determine whether the activity being regulated constitutes the "business of insurance"), *and Merchants Home Delivery Serv.*, 50 F.3d at 1489-90 (adopting a "four factor" test and applying the *Pireno* factors).

business of insurance. At a minimum, this decisional conflict with *Crawford* warrants this Court's review.

In *Crawford*, the Alabama Supreme Court evaluated Alabama's general arbitration statute, which was incorporated by reference into the state's insurance code. 757 So. 2d at 1130-36. The court found that none of the *Pireno* factors was met. *Id.* at 1133. First, the court explained, "the general anti-arbitration statute does not have the effect of 'transferring or spreading a policyholder's risk.'" *Id.* Second, the statute was "no more integral to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State," because it had "no bearing on the more essential aspects of the insurer-insured relationship" such as "the scope of insurance coverage, the term of the policy, [or] the price of the coverage." *Id.* (internal quotation marks omitted). Third, the statute was not limited to entities within the insurance industry. *Id.*

Only the court's analysis of the third factor (whether the statute was "limited" to insurers) was affected by the status of Alabama's statute as one of general applicability. The other two *Pireno* issues – whether arbitration restrictions affect risk-spreading, and whether they are integral to the relationship between insurer and insured – are the same for any statute that regulates arbitration.

There is considerable force to the Alabama Supreme Court's analysis. A state statute that regulates the ability of an insurer and a policyholder to settle disputes by arbitration does not spread risk in any way. It does affect the cost of dispute resolution. It is thus akin, as the dissenting Justices recognized below, to many laws that "could have an effect on insurance premiums." Pet. App. 28a. But, as this Court established in *Group Life & Health Ins. Co.* v. *Royal Drug, Co.*, although "arrangements" that affect an insurer's "costs" and "profits" may affect a policyholder's premiums, "they are not the 'business of insurance.'" 440 U.S. 205, 214-15 (1979); see *id.* at 214 n.12 (explaining further that "there is an

important distinction between risk underwriting and risk reduction"). Notably, in cases enforcing California's arbitration limitations against health plans, the parties and courts have accepted that arbitration restrictions do not spread risk. *Smith*, 93 Cal. App. 4th at 161; *Imbler*, 103 Cal. App. 4th at 576.[5]

Statutes restricting arbitration also are not "integral" to the relationship of insurers and policyholders. An arbitration clause does not affect the performance of an insurance agreement; it affects only the forum in which a dispute is heard, and the procedures that are employed to resolve it. Although issues of forum and procedure are important to policyholders, they are no more significant than choice-of-law issues, basic contract law issues, or other issues that are common to all contractual disputes involving any domain of commercial activity. These considerations further confirm that there is an insufficient nexus between state statutes restricting arbitration and the business of insurance to permit states to defy the strong federal policy in favor of arbitration.

3. There is a final reason why the decision below merits review. The decision below confirms that the Court's recent decision in *Kentucky Association* compounds the uncertainty created by *Fabe* over the applicability of the *Pireno* factors to cases arising under the first clause of section 2(b). Like other lower courts that have rejected *Pireno*, the Colorado Supreme Court emphasized the distinction drawn in *Fabe* between the

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[5] That California courts nevertheless enforce California's health-plan specific arbitration statute illustrates that the lower courts are also confused about the weight to give individual *Pireno* factors. *See, e.g.*, *Royal Drug*, 40 U.S. at 212-13 (risk spreading is the "critical" distinguishing attribute of insurance); *Merchants Home Delivery Serv.*, 50 F.3d at 1490-91 (the "'primary characteristic of the business of insurance is the transferring or spreading of risk,'" and absent an impact on risk-spreading, "the other two [*Pireno*] factors [must] weigh strongly" the other way for the law "to fall within the business of insurance") (citation omitted).

"*first clause*" and "*second clause*" of section 2(b). Pet. App. 14a n.8 (emphasis in original). But the Colorado Supreme Court also relied (see *id.*) upon *Kentucky Association*, where this Court held that considering the *Pireno* factors was no longer appropriate in cases involving ERISA's savings clause, in part because those factors were developed to evaluate "*conduct*" rather than "state law[s]" as ERISA requires. 123 S.Ct. at 1478 (emphasis in original). The Colorado Supreme Court evidently found this significant because the first clause of section 2(b), like ERISA's savings clause, requires evaluation of a state law. Pet. App. 14 n.8.

The rationale for the "clean break" that this Court made with the *Pireno* factors in *Kentucky Association* has compounded the confusion that *Fabe* engendered over what role, if any, those factors ought to play in cases involving the first clause of section 2(b). This Court should now resolve that confusion. A decision to abandon the *Pireno* factors altogether in such cases should be made, if at all, only by this Court, which uniquely is able to provide the guidance that lower courts need to apply section 2(b).

In *Kentucky Association* itself, for example, this Court did simply abandon the *Pireno* factors; it simultaneously adopted "two requirements" that state laws "must" meet to be saved under ERISA: such laws must be "specifically directed toward entities engaged in insurance," and must "substantially affect the risk pooling arrangement between the insurer and the insured." 123 S.Ct. at 1479. As a result, the lower courts now have a clear rule to apply in cases involving ERISA's savings clause.

Equally clear guidance is needed in cases involving section 2(b) of the McCarran-Ferguson Act. Although the differences in the standards the lower courts apply "may seem somewhat semantic, the effect is far from inconsequential." *Autry*, 144 F.3d at 1041. The differing standards lead to differing results for state laws that ought to be treated consistently under the first clause of section 2(b). By

shunning the *Pireno* factors in favor of a sweeping new test that covers not only a state tort reform measure directed at arbitration between patients and providers, but any state law that a court believes will benefit policyholders, the Colorado Supreme Court's decision severs the application of section 2(b) from its plain meaning. This Court should heed the dissent's objections below to the breadth of the majority's new test, grant plenary review, and settle the application of the McCarran-Ferguson Act to state laws that restrict the use of arbitration by insurers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 28, 2003

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APPENDIX A

SUPREME COURT OF COLORADO
EN BANC

No. 01SC744

LAWRENCE S. ALLEN, M.D.; MICHAEL K. MILLER, M.D.; TIMOTHY R. COLLINS, M.D.; and COLORADO PERMANENTE MEDICAL GROUP, P.C.,
Petitioners,

v.

KAREN PACHECO,
Respondent.

June 9, 2003.
Rehearing Denied June 30, 2003.

Chief Justice MULLARKEY delivered the Opinion of the Court.

I. Introduction

In this wrongful death case, we address the question of whether the respondent Karen Pacheco is bound by an arbitration provision contained in her deceased husband's agreement with his health maintenance organization ("HMO"). The court of appeals held that Pacheco was not bound by the arbitration agreement because the agreement does not apply to wrongful death actions filed by a member's non-party spouse. *Pacheco v. Allen*, 55 P.3d 141, 143-44 (Colo.App.2001). We affirm the court of appeals on different grounds, holding that although the arbitration provision in the HMO contract does extend to wrongful death actions filed by a member's non-party spouse, Pacheco is not bound by the arbitration provision because it does not comply with the

Colorado Health Care Availability Act ("HCAA"), §§ 13-64-403(3) and (4), 5 C.R.S. (2002). The HCAA governs the arbitration provision in this case because the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1997), exempts sections 13-64-403(3) and (4) of the HCAA from federal preemption by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 (1999).

II. Facts and Procedural History

The Kaiser Foundation Health Plan of Colorado ("Kaiser") is an HMO that provides health care services and health care insurance to its enrollees. Pacheco's husband was a Kaiser member, but Pacheco herself never became a party to the Kaiser contract. The contract between Kaiser and Pacheco's husband contained an arbitration clause requiring "any claim of medical malpractice" to be submitted to binding arbitration. The clause included claims for "death" asserted by "a Member's heir or personal representative":

> Claims . . . *shall be submitted to binding arbitration if the claim is asserted: By a Member, or by a Member's heir or personal representative*, or by a person claiming that a duty to him or her arises from a Member's relationship with Health Plan, Hospitals or Medical Group incident to this Agreement . . . *For any reason, including, but not limited to, death . . . Against* one or more of the following: Health Plan, Hospitals, Medical Group, *Any Physician*, or Any employee or agent of the foregoing.

(emphasis added).

In 1997, Pacheco's husband died after extended hospitalization for pancreatitis. Pacheco subsequently filed a wrongful death action against Dr. Lawrence S. Allen, Dr. Timothy R. Collins, Dr. Michael K. Miller, and their employer, the Colorado Permanente Medical Group, P.C.

("CPMG") (collectively, "the providers").[1] CPMG is a professional medical corporation that contracts with Kaiser to provide medical services to Kaiser members.

The trial court concluded that the arbitration clause in the contract between Kaiser and Pacheco's husband was enforceable against Pacheco because a surviving spouse is an "heir" under the plain and ordinary meaning of the agreement. The trial court also concluded that the arbitration provision was enforceable even though the provision failed to comply with the Colorado HCAA, because the FAA federally preempted the statute. Pacheco's case was then sent to arbitration, where the arbiter entered an award in favor of the providers. The trial court subsequently denied Pacheco's motion to vacate the award and Pacheco appealed, arguing that the trial court erred by binding her to the arbitration agreement.

The court of appeals reversed, holding in a published opinion that the arbitration clause was not enforceable against Pacheco because (1) a contract cannot bind a non-party to an agreement; (2) Pacheco was not her husband's "heir"; (3) a wrongful death cause of action under the Colorado Wrongful Death Act, §§ 13-21-201 to 203.7, 5 C.R.S. (2002), is a wholly separate action not covered by the terms of the Kaiser agreement; and (4) generally, the broad language of the Kaiser agreement does not extend to non-party spouses bringing wrongful death claims. *Pacheco*, 55 P.3d at 143-44. In so holding, the court of appeals found it unnecessary to reach the issue of federal preemption.

We granted certiorari to determine whether Pacheco is bound by the arbitration clause[2] and now affirm the judgment

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[1] Pacheco's claims against the treating hospital and other physicians were ultimately dismissed.

[2] We granted certiorari on the following two issues:

1. Whether plaintiff wife is required to arbitrate her claim for the wrongful death of her husband, where her husband's agreement

of the court of appeals on different grounds. We hold that although the scope of the arbitration provision does include wrongful death actions filed by a member's non-party spouse, Pacheco nevertheless is not bound by the provision because the provision does not comply with the statutory requirements set forth in the Colorado HCAA. Sections 13-64-403(3) and (4) of the HCAA govern the arbitration provision in this case because the McCarran-Ferguson Act exempts these sections of the HCAA from federal preemption.

III. Analysis

1. The Arbitration Agreement Binds a Non-Party Spouse Asserting a Wrongful Death Claim

Before addressing the statutory preemption issues raised in this case, we first explain why the scope of the Kaiser arbitration provision includes wrongful death actions filed by a member's non-party spouse.

An arbitration agreement is a contract, the interpretation of which is a matter of law that we review de novo. *See State Farm Mut. Auto. Ins. Co. v. Stein*, 940 P.2d 384, 387 (Colo. 1997) (addressing insurance policies generally). To determine whether the parties have agreed to submit the issue in question to arbitration, we follow state law principles governing contract formation. *City & County of Denver v. Dist. Ct.*, 939 P.2d 1353, 1361 (Colo.1997). We must construe the terms of the agreement in a manner that allows

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with his health maintenance organization (HMO) includes a provision requiring the arbitration of all claims for medical malpractice, including claims for "death," and claims by a "Member's heir or personal representative," where plaintiff wife is not a party to the agreement.

2. Whether, notwithstanding the court of appeals' failure to reach this issue, the Federal Arbitration Act (FAA) preempts the restrictive provisions of § 13-64-403, 5 C.R.S. (2002), and requires enforcement of the arbitration provision.

each party to receive the benefit of the bargain, and the scope of the agreement must faithfully reflect the reasonable expectations of the parties. *Id.* at 1361, 1363. In other words, we must interpret the agreement in a manner that best effectuates the intent of the parties. *Id.* at 1361.

We ascertain the parties' intent by looking to the plain language of the agreement. *State Farm*, 940 P.2d at 387. We will enforce the agreement as written unless there is an ambiguity in the language; courts should neither rewrite the agreement nor limit its effect by a strained construction. *Id.* Thus, like any contract, an arbitration agreement must be given effect according to the plain and ordinary meaning of its terms. *Id.*

In determining whether an ambiguity exists, we must ask whether the disputed provision is reasonably susceptible on its face to more than one interpretation. *Id.* We also evaluate the agreement as a whole and construe the language in harmony with the plain and generally accepted meaning of the words employed, unless the intent of the parties, as expressed in the contract, indicates that an alternative interpretation is intended. *Id.*

If ambiguities are found in the arbitration agreement, we must afford the parties a presumption in favor of arbitration and resolve doubts about the scope of the arbitration clause in favor of arbitration.[3] *See City & County of Denver*, 939 P.2d at 1364. More specifically, we must compel arbitration unless we can say "with positive assurance" that the arbitration clause is not susceptible of any interpretation that

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[3] Although the court of appeals correctly stated that ambiguities in an insurance contract generally are construed against the drafter, *see Pacheco*, 55 P.3d at 144 (citing *State Farm*, 940 P.2d at 390), the court of appeals failed to recognize this court's clear holding in *City & County of Denver*, 939 P.2d at 1364, that courts must afford ambiguities in arbitration agreements a presumption in favor of arbitration.

encompasses the subject matter of the dispute. *Id.* (citations omitted). Moreover, a "broad or unrestricted" arbitration clause makes the strong presumption favoring arbitration apply with even greater force. *Id.* (citations omitted).

In short, as we examine whether Kaiser and Pacheco's husband, via the contract between them, intended the scope of the arbitration agreement to include both (1) wrongful death claims and (2) non-party spouses, we must look to the plain and ordinary meaning of the agreement itself and construe any ambiguities in favor of arbitration.

In applying the above legal guidelines to this case, we look first to the plain language of the arbitration agreement. The contract in this case states, in pertinent part:

> It is understood that *any claim of medical malpractice* including any claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered or omitted, *will be determined by submission to binding arbitration* . . . Claims . . . *shall be submitted to binding arbitration if the claim is asserted: By a Member, or by a Member's heir or personal representative*, or by a person claiming that a duty to him or her arises from a Member's relationship with Health Plan, Hospitals or Medical Group incident to this Agreement . . . *For any reason, including, but not limited to, death*, mental disturbance, bodily injury or economic loss arising from the rendition or failure to render services . . . Against one or more of the following: Health Plan, Hospitals, Medical Group, Any Physician, or Any employee or agent of the foregoing.

(emphasis added).

In construing this agreement, the court of appeals concluded that the above provisions do not apply to wrongful death claims brought by non-party spouses such as Pacheco.

We disagree. In interpreting the words of the agreement in accord with their plain and ordinary meaning, we find that the agreement applies not only to (1) wrongful death claims as claims for "death," but also to (2) non-party spouses as "heirs."

First, the arbitration agreement plainly applies to "*any claim* of medical malpractice" and any claim brought "*[f]or any reason, including, but not limited to, death* . . . ." The plain and ordinary meaning of this wording reveals a clear intent to include wrongful death claims within the scope of claims that must be submitted to binding arbitration. Even if we were to characterize the provision as ambiguous due to the fact that the exact term "wrongful death" is not used in the agreement, the language of the agreement as a whole is very broad. Because the presumption in favor of arbitration is strongest where the language of the agreement is "broad or unrestricted," *City & County of Denver*, 939 P.2d at 1364, the arbitration provision in this case is best construed as one that includes wrongful death claims.

Despite the contract's highly inclusive reference to claims brought "*[f]or any reason, including, but not limited to, death*," the court of appeals held that wrongful death claims are not covered by the terms of the agreement because under the Colorado Wrongful Death Act, §§ 13-21-201 to 203.7, 5 C.R.S. (2002), a wrongful death cause of action "is wholly separate and distinct from any action [Pacheco's] husband might have maintained." *Pacheco*, 55 P.3d at 143 (citing *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949); *Rowell v. Clifford*, 976 P.2d 363 (Colo.App.1998)). Although it is true that a wrongful death claim is separate and distinct from a cause of action the deceased could have maintained had he survived, this observation is not helpful in determining whether separate wrongful death claims are in fact included within the plain and ordinary meaning of the agreement. Because the plain language of the agreement in this case

refers to "all claims" including those brought for "death," and because we must apply a strong presumption in favor of arbitration, we find that the arbitration agreement applies to wrongful death claims.

Having established that the scope of the agreement includes wrongful death actions, we now determine whether the scope of the agreement also includes non-party spouses. We hold that the arbitration agreement does apply to non-party spouses because (a) a non-party may be bound by the terms of an agreement if the parties so intend and because (b) a spouse is an "heir" under the meaning of the agreement.

The court of appeals reasoned that the arbitration clause does not apply to a non-party such as Pacheco because a non-party to a contractual agreement cannot be bound by its terms. *Pacheco*, 55 P.3d at 143. This statement of the law is inaccurate. Although it is true that in general, only the parties to a contract are bound by its terms, a non-party may fall within the scope of the agreement if the parties so intend. *Jefferson County Sch. Dist. No. R-1 v. Shorey*, 826 P.2d 830, 843 (Colo.1992); *Parker v. Ctr. For Creative Leadership*, 15 P.3d 297, 298 (Colo.App.2000); *Everett v. Dickinson & Co., Inc.*, 929 P.2d 10, 12 (Colo.App.1996); *Eychner v. Van Vleet*, 870 P.2d 486, 489 (Colo.App.1993).[4]

In this case, the arbitration agreement binds not only claims brought by signatory members, but also claims brought by a member's "heir or personal representative, or by a person

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[4] In *City & County of Denver*, 939 P.2d at 1370, this court stated generally that "[a] non-party to an agreement containing an ADR clause may not be compelled to use the ADR procedures." *City & County of Denver* did not, however, involve an ADR provision specifically addressing non-parties. *See id.* at 1359. Here, in contrast, we construe an arbitration provision expressly purporting to bind not only the signatory, but also certain non-parties who are in privity with the signatory, namely an "heir or personal representative or . . . a person claiming that a duty to him or her arises from a Member's relationship with [Kaiser]."

claiming that a duty to him or her arises from a Member's relationship with [Kaiser] incident to this Agreement." The contract clearly does not require that these heirs, personal representatives, or persons claiming special duties actually sign and become parties to the contract before they can fall within the scope of the arbitration agreement. Because the contract reflects the intent of the parties to bind claimants other than signatory members, the fact that Pacheco is a non-party does not by itself exempt her from the arbitration agreement. So long as she is within the category of heirs, personal representatives, or persons claiming special duties, she is bound by the arbitration agreement.

In this case, Pacheco is her husband's "heir" under the meaning of the agreement. To reach this conclusion, we follow the same legal analysis used above: we look first to the plain and ordinary meaning of the agreement and then construe any ambiguities in favor of arbitration. Here, the term "heir" as used in the arbitration agreement is ambiguous because the term may or may not include spouses[5]—as we explain below, the term is reasonably susceptible on its face to more than one interpretation. *See State Farm,* 940 P.2d at 387.

On one hand, it is well-established that the definition of "heirs" as used in the Colorado Wrongful Death Act, §§ 13-21-201 to 204, 5 C.R.S. (2002) does not include spouses.[6]

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[5] The trial court did not find ambiguity, stating, "interpreting the words of the agreement in accord with their plain and ordinary meaning mandates that the word 'heir' be read to include a surviving spouse."

[6] As used in the Wrongful Death Act, section 13-21-201(1), 5 C.R.S. (2002), the term "heirs" designates which class of persons may file a wrongful death claim if the spouse has not already filed a claim within one year of the decedent's death:

> (a) In the first year after such death: (I) By the spouse of the deceased;
>
> (II) Upon the written election of the spouse, by the spouse and the heir or heirs of the deceased;

See, e.g., Hindry v. Holt, 24 Colo. 464, 468, 51 P. 1002, 1004 (1897); *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129, 1131 (Colo.App.1997) (the term "heirs" under the Wrongful Death Act refers only to lineal descendants of the deceased). The court of appeals in this case relied on the Wrongful Death Act's definition of "heirs" when it refused to characterize Pacheco as an "heir" under the meaning of the arbitration agreement. *Pacheco*, 55 P.3d at 143.

On the other hand, some Colorado cases have generally referred to spouses as "heirs." *See, e.g., Binkley v. Switzer*, 75 Colo. 1, 3, 223 P. 757, 758 (1923) (stating that a decedent left "his widow as his heir"); *Tanski v. Tanski*, 820 P.2d 1143, 1144 (Colo.App.1991) (referring to a surviving spouse as an "heir at law"); *Clint v. Stolworthy*, 144 Colo. 597, 600, 357 P.2d 649, 651 (1960) (referring to "heirs other than the widow"). Moreover, the commonly understood notion of the term "heir" is very broad, loosely defined as "a person who inherits real or personal property." Black's Law Dictionary 727 (7th ed.1999). Also, the arbitration agreement here is not limited to wrongful death claims—the agreement requires "all claims" to be submitted to binding arbitration. Therefore, there is no automatic connection between the definition of "heirs" as used in the Wrongful Death Act and the definition of "heir" as used in this agreement. Thus, we may reasonably interpret the term "heir" as a term that includes spouses.

As with any ambiguity in an arbitration agreement, we must resolve doubts about the scope of the arbitration agreement in favor of arbitration. *City & County of Denver*, 939 P.2d at 1364. We must compel arbitration unless we can say "with positive assurance" that the arbitration clause is not susceptible of any interpretation that encompasses the subject

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(III) Upon the written election of the spouse, by the heir or heirs of the deceased; or

(IV) If there is no spouse, by the heir or heirs of the deceased.

matter of the dispute. *See id.* Because the term "heir" as used in the arbitration agreement is ambiguous and is susceptible of an interpretation that encompasses spouses, we construe the term inclusively and hold that spouses are within the scope of the agreement.

Our inclusive interpretation not only adheres to the presumption in favor of arbitration, but also avoids an absurd result. In this case, an exclusion of spouses from the term "heirs" would run counter to the arbitration agreement's otherwise broad terms. If spouses are not "heirs," a member's husband or wife would not need to arbitrate any claims whatsoever, let alone claims asserting wrongful death. Meanwhile, the member, the member's children, the member's personal representative, and any person claiming a special duty must still arbitrate "all claims" brought "[f]or any reason." Given the broad terms of the arbitration agreement, we find it highly unlikely that the parties intended to exclude spouses in such a sweeping manner.

In sum, we reject the court of appeals' analysis and agree with the trial court that the arbitration agreement applies to both (1) wrongful death actions and (2) non-party spouses. Nevertheless, we affirm the court of appeals' holding that the arbitration agreement is unenforceable against Pacheco, because the agreement does not comply with the requirements set forth in the Colorado HCAA.

2. The McCarran-Ferguson Act Exempts the Colorado HCAA from Federal Preemption by the FAA

The parties do not dispute that the arbitration agreement in this case does not comply with the regulations set forth in the Colorado HCAA, or Health Care Availability Act. Sections 13-64-403(3) and (4) of the HCAA mandate specific language and typeface requirements for arbitration provisions contained in medical services agreements. The General Assembly enacted these regulations with the express intent

"that an arbitration agreement be a voluntary agreement between a patient and a health care provider." § 13-64-403(1), 5 C.R.S. (2002). In this case, the arbitration agreement between Kaiser and Pacheco's husband lacks the language and bold-faced type notice required by the HCAA. Normally, this non-compliance alone would render the agreement unenforceable against Pacheco.

Here, however, the parties have raised the issue of whether the HCAA is federally preempted by the FAA, or Federal Arbitration Act. The FAA upholds the validity of arbitration agreements contained in any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. If the FAA preempts the HCAA, the HCAA will not govern the arbitration agreement and the agreement is enforceable against Pacheco. If the HCAA is not preempted, Kaiser's non-compliance with the HCAA is fatal and Pacheco is not bound by the agreement.

Typically, when a state enacts arbitration statutes of general applicability and the statute is inconsonant with the FAA, the FAA preempts that state law. *See, e.g., Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687-88, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir.1971) (finding preemption where the arbitration statute was one of general application); *Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (2d Cir.1969) (finding preemption where the arbitration statute applied generally to all contracts). The Colorado HCAA is not a statute of general applicability because it targets only arbitration agreements contained in medical services contracts. Its detailed arbitration regulations clearly conflict with the FAA, which broadly states that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2. The Federal District Court for the District of Colorado has

held that because sections 13-64-403(3) and (4) of the HCAA and the FAA are "inconsonant," the state regulations are preempted. *Morrison v. Colo. Permanente Med. Group*, 983 F.Supp. 937, 943 (D.Colo.1997).

Our preemption analysis, however, does not end here. A critical issue not addressed in *Morrison* but raised by Pacheco in this case is the question of whether the McCarran-Ferguson Act "reverse-preempts" the FAA preemption of the HCAA arbitration regulations. The McCarran-Ferguson Act provides, in relevant part:

> *No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance* . . . unless such Act specifically relates to the business of insurance. *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012(b) (emphasis added).

In other words, under the first clause of section 1012(b), the McCarran-Ferguson Act exempts a state statute from federal preemption if the state law is enacted "for the purpose of regulating the business of insurance" and if the federal statute does not specifically "relate to the business of insurance." It is undisputed here that the FAA does not relate to the business of insurance. Therefore, the remaining issue left for us to resolve is whether sections 13-64-403(3) and (4) of the Colorado HCAA are state laws enacted "for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act. If so, the FAA will

not preempt the HCAA and the arbitration agreement in this case is unenforceable.

The United States Supreme Court has decided two key cases clarifying when a state law has been enacted "for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act.[7] In *SEC v. National Securities, Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), the Court focused on the relationship between the insurance company and the policyholder and held that any state statute "aimed at protecting or regulating this relationship," either directly or indirectly, is a law regulating the "business of insurance" under the meaning of the Act. *Id.*[8]

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[7] Other cases addressing the meaning of "business of insurance" in an ERISA context are similar to McCarran-Ferguson cases, but the Supreme Court has recently made clear that the two inquiries are separate and distinct. *Kentucky Ass'n of Health Plans, Inc. v. Miller*, ___ U.S. ___, ___, 123 S.Ct. 1471, 1479, 155 L.Ed.2d 468 (2003).

[8] In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Supreme Court identified three specific, but non-determinative, considerations to be weighed when determining whether certain *practices by private actors* constitute the "business of insurance." These criteria include whether the practice: (1) has the effect of transferring or spreading a policyholder's risk; (2) is an integral part of the policy relationship between the insurer and the insured; and (3) is limited to entities within the insurance industry. *Id.* (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979)). We do not specifically rely on the *Pireno* and *Royal Drug* factors because these factors arise from cases seeking to characterize conduct by private actors in the antitrust context under the *second clause* of section 1012(b). *See United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 504-05, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). These factors do not apply directly to the broader issue, under the *first clause* of section 1012(b), of whether a state law has been enacted for the "purpose of regulating the business of insurance." *Id.; see also Miller*, ___ U.S. ___, 123 S.Ct. 1471, 155 L.Ed.2d 468.

In this case, the trial court incorrectly framed the *Pireno* factors as a mandatory three-part test, of which all three factors had to be met before the law could be characterized as regulating the "business of insurance."

More recently, the Supreme Court re-emphasized the *National Securities* principle in *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), maintaining that the essence of regulating the business of insurance is to regulate the relationship between the insurance company and the policyholder. *See id.* at 501, 113 S.Ct. 2202. Under this principle, a federal law must yield to a state statute to the extent that the state statute "furthers the interests of policyholders." *Id.* at 502, 113 S.Ct. 2202.

Following *Fabe*, the Tenth Circuit Court of Appeals has similarly focused the "business of insurance" test on whether the state statute in question was enacted for the purpose of protecting policyholders. *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir.1998) (finding that McCarran-Ferguson exempted a state court's blanket stay order from FAA preemption because the stay "manifests a purpose of protecting policyholders" in a liquidation setting). *Davister* is consistent with a line of cases focusing on whether the state law directly regulates the contractual relationship between an insurer and insured. *See, e.g., Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 933 (10th Cir.1992) (holding that a Kansas statute expressly invalidating an arbitration agreement contained in an insurance contract is a statute that touches the core of the 'business of insurance' under the meaning of McCarran-Ferguson); *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397, 401-02 (S.C.Ct.App.2001) (a South Carolina statute barring arbitration in an insurance contract is "an integral part of the policy relationship between the insurer and the insured" because it places limits on the enforceability of an agreement to spread risk).

In this case, sections 13-64-403(3) and (4) of the Colorado HCAA not only directly regulate contracts between health insurance policyholders and their insurers (in this case,

HMOs[9]), but also further the interests of these policyholders. Sections 13-64-403(3) and (4) directly regulate health insurance contracts by requiring HMOs to include specific notice language, in ten-point, bold-faced type, of any arbitration agreement contained within the health insurance contract. If the HMO that drafted the insurance contract fails to give the policyholder proper notice of the arbitration agreement, the HCAA protects the policyholder by invalidating that provision of the contract. By regulating health insurance contracts drafted by the health care provider and by protecting patients who are insured by that provider, sections 13-64-403(3) and (4) of the HCAA qualify as laws enacted "for the purpose of regulating the business of insurance." *Accord Smith v. PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal.App.4th 139, 161, 113 Cal.Rptr.2d 140 (2001) (holding that the McCarran-Ferguson Act applies to a state statute specifically regulating the words that an HMO can use when including an arbitration clause in its medical services plan).

It is irrelevant that other sections of the HCAA, outside of sections 13-64-403(3) and (4), address medical malpractice issues not involving the relationship between an insurer and insured. *Fabe* makes clear that a statute, "to the extent that it regulates policyholders," qualifies as a statute "enacted for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act. *Fabe*, 508 U.S. at 508, 113 S.Ct. 2202. Moreover, the fact that sections 13-64-403(3) and (4) of the HCAA apply to "health care providers"

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[9] HMOs simultaneously function as health care providers and health care insurers. *See Rush Prudential HMO, Inc., v. Moran*, 536 U.S. 355, 367-70, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002); *Imbler v. PacifiCare of Cal., Inc.*, 103 Cal.App.4th 567, 573, 126 Cal.Rptr.2d 715 (2002). Given the modern reality that HMOs have virtually replaced traditional health care insurers, the relationship between an HMO "medical service provider" and "patient" is the relationship between a "medical insurer" and "insured."

instead of exclusively to insurers such as HMOs does not nullify our conclusion that sections 13-64-403(3) and (4) were enacted for the "purpose of regulating the business of insurance." As long as the statute is not one of general applicability, it is not necessary that the state statute relate only to insurance or that the statute be in the form of an insurance code. *Great Plains*, 969 F.2d at 934. Therefore, the fact that sections 13-64-403(3) and (4) of the HCAA technically include non-insurer "health care providers" such as physicians does not prevent these sections of the HCAA from qualifying as statutes enacted "for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act.

In sum, to the extent that sections 13-64-403(3) and (4) of the HCAA do specifically regulate the relationship between a health insurer and its policyholder, *see National Securities*, 393 U.S. at 460, 89 S.Ct. 564, and to the extent that these provisions of the HCAA do further the interests of these policyholders by ensuring adequate notice of arbitration agreements, *see Fabe*, 508 U.S. at 502, 113 S.Ct. 2202, the HCAA is a statute "enacted for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act.

The McCarran-Ferguson Act therefore exempts sections 13-64-403(3) and (4) of the HCAA from federal preemption by the FAA, meaning that those sections of the HCAA govern the arbitration agreement in this case. Because the agreement here does not comply with sections 13-64-403(3) and (4) of the HCAA, the agreement is unenforceable and Pacheco is not required to submit her wrongful death claim to binding arbitration.

IV. Conclusion

For the foregoing reasons, we reject the analysis of the court of appeals but uphold the result it reached. We conclude that the scope of the arbitration agreement between Kaiser and Pacheco's husband includes wrongful death claims brought by non-party spouses. The arbitration agreement is unenforceable, however, because it does not comply with the Colorado HCAA. Therefore, we affirm the judgment of the court of appeals.

Justice KOURLIS dissents, and Justice BENDER joins in the dissent.

Justice KOURLIS, dissenting:

Because I do not read the Colorado Health Care Availability Act, § 13-64-403, 5 C.R.S. (2002), as a law aimed at regulating the "business of insurance," I do not view the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1997), as applicable. For that reason, although I concur in the Majority's conclusion that the arbitration agreement at issue here applies to wrongful death actions and to non-party spouses, I respectfully dissent from the conclusion that the McCarran-Ferguson Act exempts sections 13-64-403(3) and (4) of the Colorado Health Care Availability Act from federal preemption.

I. The Colorado Health Care Availability Act

The analysis in this case is complex and, for me, is best undertaken in simple steps. There are three relevant pieces of legislation, state and federal, which come into play. The first is the Colorado Health Care Availability Act ("HCAA"), specifically Part 4, Procedures and Evidence in Medical Malpractice Actions. §§ 13-64-401 *et. seq.*, 5 C.R.S. (2002). The HCAA evidences the General Assembly's intent that arbitration agreements be a voluntary and knowing contractual undertaking between the patient and the health care provider. To that end, the statute requires certain bold-faced language in the agreement, designed to notify the patient that by signing the agreement, he or she is "agreeing to have any issue of medical malpractice decided by neutral binding arbitration rather than by a jury or court trial." § 13-64-403(4). It is undisputed that in this case, the agreement did not contain that notice and thus, would be unenforceable.[1] To

[1] We so held in *Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218, 1226 (Colo.1996). We did not address the FAA preemption argument in that case because it was not raised and preserved at the trial court level.

this point in the analysis, therefore, by operation of Colorado law, the arbitration award in this case would be vacated and Karen Pacheco would be entitled to proceed in her wrongful death lawsuit.

II. The Federal Arbitration Act

The next step in the analysis, however, involves the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et. seq.* (1999). I agree with the Majority that the FAA would apply to this contract, but because I would also hold that it is the focal or dispositive statute, I expand upon the Majority's discussion somewhat. The FAA states that:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The purpose of the FAA is to "overcome courts' refusals to enforce agreements to arbitrate" and is grounded in Congress' powers under the Commerce Clause. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). In enacting the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). Generally, then, the FAA preempts state law that conflicts with it, by operation of the Supremacy Clause. U.S. Const. art. VI, cl. 2.

The agreement here pertains to transactions involving commerce, in that it provides for medical services in other states to its Colorado members. *See Grohn v. Sisters of*

Charity Health Svcs. Colo., 960 P.2d 722, 725-26 (Colo. App.1998) (hospital's business activities, which include payment of out-of-state medical costs of in-state insureds, and receipt of goods and services from out-of-state vendors constitute transactions "involving commerce" within the ambit of the FAA). Hence, the only question is whether the FAA would otherwise apply to invalidate the specific proscriptions of the HCAA and render the arbitration agreement enforceable even though it does not comply with the HCAA.

The FAA establishes federal substantive law that governs issues of enforceability for all arbitration agreements that involve commerce. *Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). To the extent that any state law conflicts with the FAA, that state law is preempted by operation of the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2; *Southland Corp.*, 465 U.S. at 16, 104 S.Ct. 852; *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

An arbitration clause almost identical to the one at issue here was held enforceable by the United States District Court for the District of Colorado in *Morrison v. Colorado Permanente Medical Group, P.C.*, 983 F.Supp. 937 (D.Colo. 1997). In that case, the court viewed *Doctor's Associates* as dispositive. The Supreme Court, in *Doctor's Associates*, held that the FAA preempted a Montana statute, which also required arbitration agreements to contain a special notice, in underlined capital letters. The Court held:

> By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the

> enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act.

517 U.S. at 687, 116 S.Ct. 1652 (internal citations omitted). Following the Court in *Doctor's Associates*, the court in *Morrison* held that the medical services arbitration provisions found in sections 13-64-403(3) and (4) of the HCAA were preempted by the FAA. 983 F.Supp. at 943.

By creating special language requirements for arbitration provisions in medical service agreements, it is my view that the HCAA does indeed impose special conditions on medical arbitration agreements not applicable to contracts generally. Accordingly, those special requirements imposed by Colorado legislation would be preempted by the FAA, and the arbitration clause in this agreement would be valid and enforceable even though it does not contain the special notice required by the HCAA.

III. The McCarran-Ferguson Act

The final step in this inquiry then must turn to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1997), which the Majority holds would operate to preclude the FAA from applying and would therefore revive the Colorado statutory requirements. That Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . ." 15 U.S.C. § 1012(b). Pacheco argues, and the Majority agrees, that this Act operates as a bar to what would otherwise be FAA preemption because sections 13-64-403(3) and (4) of the Colorado HCAA involve the "business of insurance." On this point, I disagree.

The history of the McCarran-Ferguson Act is relevant to the limited construction I here suggest. McCarran-Ferguson was enacted in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). In that case, the Court held that insurance transactions were subject to federal regulation in general under the Commerce Clause, and to the antitrust laws in particular. *Id.* at 553, 560-61, 64 S.Ct. 1162. Prior to that, the states had assumed the exclusive regulation of insurance. Congress acted by passing the McCarran-Ferguson Act to assure that the states would continue to have "a free hand in regulating the dealings between insurers and their policyholders," *Sec. & Exch. Comm'n v. Nat'l Sec., Inc.*, 393 U.S. 453, 459, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), but did not intend "to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision [in *South-Eastern*]." *Id.* (quoting H.R.Rep. No. 143, 79th Cong., 1st Sess., 3 (1945)).

In *National Securities*, the Supreme Court was called upon to determine whether an action by the Securities and Exchange Commission to invalidate a merger of insurance companies that had been approved by the State of Arizona was barred by the McCarran-Ferguson Act. The Court held that it was not, noting in its analysis that the McCarran-Ferguson Act was intended to protect the dealings between insurance companies and their policyholders, and not to protect the many other activities in which insurance companies engage. *Id.* at 460, 89 S.Ct. 564. In an effort to explain the reach of the Act and what would constitute the "business of insurance," the Court stated:

> Certainly the fixing of rates is part of this business. . . . The selling and advertising of policies, and the licensing of companies and their agents are also within the scope of the statute. Congress was concerned with the type of

> state regulation that centers around the contract of insurance. . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.

Id. (internal citations omitted). Importantly, the Court distinguished between provisions of state law focusing on the relationship between *stockholders* and the company, and provisions dealing specifically with service to *policyholders*. *Id.* The Court held that the former was not within the scope of McCarran-Ferguson, while the latter was.[2] *Id.* at 460-62, 89 S.Ct. 564.

The Court again provided guidance for the application of the McCarran-Ferguson Act in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). In that case, the Court held that a health insurance provider's use of a professional association's peer review committee to determine reasonableness and necessity of chiropractic charges did not constitute the "business of insurance" so as to be exempted from application of federal antitrust laws. *Id.* at 129, 102 S.Ct. 3002. The Court outlined three factors, commonly referred to as the *Pireno* factors, to

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[2] While the court found that the provision requiring the State Director of Insurance to conclude that the security of and services rendered to policyholders would not be substantially reduced by a proposed merger before approving it was within the scope of McCarran-Ferguson, as it clearly related to the "business of insurance," the Court found no conflict between the federal and state law and allowed application of both. *Id.* at 462, 89 S.Ct. 564.

assist in determining what constitutes the "business of insurance:" "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979)). While noting that not one of the factors was in itself determinative, the court found that the Peer Review Committee met none of the factors and was not, therefore, part of the "business of insurance." *Id.* at 129-32, 102 S.Ct. 3002.

In *United States Department of Treasury v. Fabe*, 508 U.S. 491, 504, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), the Court held that an Ohio bankruptcy priority statute relating to liquidation of a bankrupt insurance company escaped federal bankruptcy law preemption by operation of the McCarran-Ferguson Act because the Ohio law was "designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy." In *Fabe*, the Court did observe that it had developed and applied the *Pireno* factors in the context of analyzing Sherman Antitrust Act issues under the second clause of the McCarran-Ferguson Act, and that those factors were, therefore, not definitive. *Id.* at 505, 113 S.Ct. 2202; *see also Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir.1998) (holding that a Utah state statute consolidating all claims against a liquidating insurer was enacted to protect policyholders and was, therefore, exempt from application of the FAA by reason of the McCarran-Ferguson Act). However, even without the *Pireno* factors, the court in *Fabe* held that the business of insurance preserved to state regulation relates to the rights of policyholders. *Fabe*, 508 U.S. at 506, 113 S.Ct. 2202.

Hence, to the extent that *Pireno* continues to apply to non-antitrust inquiries, I would observe that the Colorado HCAA provisions at issue are not "integral to the policy relationship between" the medical service provider and its insurer, nor do they regulate, constrain, set benefits, exclusions or limitations that effect the relationship between the insurer and the policyholders.

Even if the proper inquiry in determining whether the statute at issue is whether the statute is "aimed at protecting or regulating" the relationship between the insurance company and the policyholder, Maj. op. at 382-383, I suggest that the HCAA cannot meet that test. The provisions of the Colorado HCAA at issue here, specifically part 4, deal with "Procedures and Evidence in Medical Malpractice Actions." As the title indicates, the primary purpose of these provisions is to control and constrain medical malpractice actions, not to regulate the insurance policy itself. Indeed, the effect of the statute may be to reduce medical malpractice premiums; however, that consequence does not change the fact that the provisions were enacted to control medical malpractice *actions*, not medical malpractice insurance within the meaning of the McCarran-Ferguson Act. It is particularly evident that sections 13-64-403(3) and (4) of the HCAA is not related to the "business of insurance" because its focus is solely on protecting the informed choice of *patients*, so as not to bind them to an arbitration clause without their knowledge. That purpose is not about insurance.

Beginning with the easy axiom, if the HCAA arbitration provision were a general law concerning what an arbitration agreement must contain in order to be valid in Colorado, that law would likely find no shelter within the McCarran-Ferguson Act, but would rather be construed as a law of general application. *See Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir.1971) (enforcing an arbitration agreement by holding the McCarran-Ferguson Act did not apply because

the court found the provisions had general applicability to contract disputes); *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606 (2nd Cir.1969) (finding that arbitration statutes did not regulate the "business of insurance"; rather, they regulated the method of handling contract disputes generally); *Am. Bankers Ins. Co. v. Crawford*, 757 So.2d 1125 (Ala.1999) (enforcing an arbitration agreement in a policy despite State's anti-arbitration statute because statute did not regulate the "business of insurance" as to prevent enforcement of the policy under the FAA). As the Colorado HCAA applies generally to medical service providers and their patients, and not specifically to the relationship between insurers and their insureds, it would be a law of general application, and thus not subject to the McCarran-Ferguson savings clause.

Thus, it is the placement of the arbitration clause limitation language within the HCAA that must be the pivotal factor—it must evidence the General Assembly's intent to regulate only certain arbitration agreements that impact upon or relate to insurance. I do not so read the HCAA. Rather, I read the HCAA not as aimed at the relationship between the medical services provider and the insurer, but rather as being aimed at the relationship between the medical services provider and the patient. Granted, the General Assembly did indeed express its intent in enacting the legislation to contain the increasing costs of malpractice insurance,[3] but they chose to address that goal by limiting the remedies available to a patient claiming malpractice against a medical services provider—not by regulating the amount which an insurer could charge in premiums or by regulating the nature of

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[3] Notably, the result advocated by the Majority would have the converse result. Application of the McCarran-Ferguson Act to the Colorado HCAA operates to disadvantage the doctor, as a malpractice insurance policyholder, because he will be subjected to a full trial, rather than having recourse in the enforcement of the arbitration award.

coverage the insurers could or should provide. For example, although "qualified insurer" is a defined term, it appears only twice in the HCAA: in the section concerning periodic installment obligations, section 13-64-206, and in the section concerning funding that obligation, section 13-64-208.

The HCAA is about containing and limiting malpractice awards, with the intent thereby of reducing malpractice insurance premiums and stemming the exodus of doctors from the profession. To say that it is "aimed at the business of regulating insurance" is to say that any legislation that has an effect on insurance premiums is aimed at the business of regulating insurance. So, for example, legislation requiring drivers to wear seat belts or motorcycle riders to wear helmets would be aimed at the business of regulating insurance because it could have an effect on insurance premiums. In short, I suggest that the interpretation the Majority affords the McCarran-Ferguson Act sweeps with a broad and wide arc that could swallow federal preemption under the Supremacy Clause.

IV. Conclusion

Accordingly, although I concur in portions of the Majority opinion, I dissent from the ultimate result and would instead reverse the court of appeals' opinion and uphold the trial court's judgment enforcing the arbitration award.

I am authorized to state that Justice BENDER joins in this dissent.

APPENDIX B

COLORADO COURT OF APPEALS
DIVISION I

No. 00CA1624

KAREN PACHECO,
Plaintiff-Appellant,

v.

LAWRENCE S. ALLEN, M.D.; MICHAEL K. MILLER, M.D.;
TIMOTHY R. COLLINS, M.D.; and
COLORADO PERMANENTE MEDICAL GROUP, P.C.,
Defendants-Appellees.

Sept. 13, 2001.
Certiorari Granted Sept. 23, 2002.

Opinion by Judge METZGER.

In this wrongful death action, plaintiff, Karen Pacheco, appeals the judgment confirming the arbitration award entered in favor of defendants, Lawrence S. Allen, M.D., Michael K. Miller, M.D., and Timothy R. Collins, M.D. (defendant physicians), and Colorado Permanente Medical Group, P.C. (CPMG), their employer. We reverse and remand for further proceedings.

Plaintiff's husband died following extended hospitalization for treatment of pancreatitis. Plaintiff subsequently commenced this wrongful death action, alleging that defendant physicians had been negligent in diagnosing and treating her husband.

The medical services at issue were provided by defendant physicians, who were employed by CPMG, a physician group

that had contracted with Kaiser Foundation Health Plan of Colorado (Kaiser) to provide medical care to Kaiser enrollees. Kaiser's Medical and Hospital Service Agreement requires arbitration of Medical Malpractice Claims:

> It is understood that any claim of medical malpractice, including any claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered or omitted, will be determined by submission to binding arbitration in accordance with the provisions of the "Uniform Arbitration Act of 1975", part 2 of article 22 of title 13, Colorado Revised Statutes, and not by a lawsuit or resort to court process except as Colorado law provides for judicial review of arbitration proceedings. . . .

Defendants filed a motion to compel plaintiff to submit to binding arbitration, as required by her husband's agreement with Kaiser. Plaintiff objected. The trial court granted the motion, and the case was arbitrated.

After the arbitrator entered an award in favor of defendants, plaintiff filed a motion to vacate the award, alleging that no enforceable arbitration agreement existed. She also asked the court to reconsider its order compelling arbitration. This appeal follows the denial of her requests by the trial court, a different judge presiding.

Plaintiff contends the trial court erred in determining she was a party to the agreement and that, therefore, she was bound by its requirement that disputes must be arbitrated. We agree.

The agreement provides:

> Claims . . . shall be submitted to binding arbitration if the claim is asserted:
>
> (a) By a Member, or by a Member's heir or personal representative, or by a person claiming that a duty to

him or her arises from a Member's relationship with Health Plan, Hospitals or Medical Group incident to this Agreement . . .

(b) For any reason, including, but not limited to, death, mental disturbance, bodily injury or economic loss arising from the rendition or failure to render services or the provision or failure to provide benefits under this Agreement or the consideration or defense of claims described in this Section,

(c) For monetary damages exceeding the jurisdictional limit of the Small Claims Court, and

(d) Against one or more of the following . . .

(i) Health Plan,

(ii) Hospitals,

(iii) Medical Group,

(iv) Any Physician, or

(v) Any employee or agent of the foregoing.

Because an arbitration agreement is a contract, a party cannot be required to submit a dispute to arbitration that he or she has not agreed to submit. *See Everett v. Dickinson & Co.*, 929 P.2d 10 (Colo.App.1996). Similarly, a nonparty to an agreement containing an arbitration clause may not be compelled to use arbitration procedures. *See City & County of Denver v. District Court*, 939 P.2d 1353 (Colo.1997); *see also Eychner v. Van Vleet*, 870 P.2d 486 (Colo.App.1993).

The record contains no evidence that plaintiff agreed to submit her claim to arbitration or that she signed the agreement. Thus, she is not a party to the agreement and is not bound by its terms.

Additionally, we conclude that plaintiff is not bound by the arbitration provision because she is not an "heir" of her husband. In wrongful death actions, that term refers only to

lineal descendents of the deceased and not to a spouse. *See Hindry v. Holt*, 24 Colo. 464, 51 P. 1002 (1897); *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129 (Colo.App.1997). Thus, the agreement's provision binding an heir does not apply to plaintiff.

Further, we note that plaintiff's wrongful death claim is not covered by the terms of the agreement.

Colorado law is clear that the cause of action created by the Wrongful Death Act, § 13-21-201, et seq., C.R.S.2001, is separate and distinct from the cause of action the deceased would have had for personal injuries had he survived. The Wrongful Death Act is not a survival statute. *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949). Therefore, as a division of this court held in *Rowell v. Clifford*, 976 P.2d 363 (Colo.App.1998), even when the statute of limitations would have barred the decedent's personal injury claim as of the time of his death, the decedent's surviving spouse had a separate and viable wrongful death claim with its own statute of limitations.

Because plaintiff's cause of action for wrongful death here is wholly separate and distinct from any action her husband might have maintained, the arbitration provision is not applicable to her.

Finally, we reject defendants' assertions that the broad language of the agreement, which states that "claims . . . by a member's heir . . . for any reason . . . against any physician" shall be submitted to binding arbitration, makes it applicable to plaintiff. The omission of the term "spouse," assuming one can bind the other, and the fact that a wrongful death action is wholly separate from a claim for personal injuries are critical distinctions, which we cannot overlook. Moreover, even if we were to say that the agreement is ambiguous, we would be required to construe it against Kaiser as the drafter. *State Farm v. Stein*, 940 P.2d 384 (Colo.1997).

Nor do we agree with defendants that the decision in *Herbert v. Superior Court*, 169 Cal.App.3d 718, 215 Cal. Rptr. 477 (1985), compels a different result. There, the California court held that a decedent's spouse and adult children, none of whom had signed the agreement to arbitrate, were nevertheless bound by it. The court reasoned that nonsigning heirs should be bound by their decedent's agreement to arbitrate all disputes for the following reasons: (1) a single cause of action exists in the heirs for the wrongful death of a decedent; (2) a wrongful death action, in a practical sense, is derivative of a cause of action in the deceased; (3) it is unrealistic and impractical to require the signatures of all the heirs (who are not- identified until the time of the decedent's death); (4) decedents can bind their heirs through contracts and wills; and (5) arbitration is neither an extraordinary procedure nor disadvantageous to the heirs.

Because an action under the Colorado Wrongful Death Act is not derivative of a cause of action in the deceased, *Fish v. Liley, supra; Rowell v. Clifford, supra*, this difference in the characterization of wrongful death actions renders the decision in *Herbert v. Superior Court, supra*, inapposite.

Consequently, the decedent's agreement with Kaiser does not apply to plaintiff, and the trial court erred in requiring her to arbitrate her claim.

In light of this disposition, it is unnecessary to address plaintiff's other contentions of error.

The judgment is reversed, and the case is remanded for further proceedings.

Chief Judge HUME and Judge ROY, concur.

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER
STATE OF COLORADO
Courtroom 7

[Filed Jul. 19, 2000]

Case No. 98CV2340

KAREN PACHECO,

Plaintiff,

v.

LAWRENCE S. ALLEN, M.D., MICHAEL K, MILLER, M.D.,
TIMOTHY R. COLLINS, M.D., and
COLORADO PERMANENTE MEDICAL GROUP, P.C.

Defendants.

ORDER

Plaintiff in this matter has filed a Motion to Vacate Arbitration Award and for Reconsideration. Following the briefing of that motion, Defendants filed their Motion for Entry of Judgment.

The court hereby orders that Plaintiff's Motion to Vacate Arbitration Award and for Reconsideration is denied. Judgment shall enter for Defendants and against the Plaintiff in the amount of $30,900.70.

Dated this 18 day of July, 2000.

BY THE COURT

/s/ Warren O. Martin
WARREN O. MARTIN
District Court Judge

cc: Gary S. Cohen, Esq.
Daniel M. Hubbard, Esq.

APPENDIX D

IN RE ARBITRATION
AWARD OF ARBITRATOR

[Filed Mar. 24, 2000]

KAREN PACHECO,

Plaintiff,

v.

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D.,
TIMOTHY R. COLLINS, M.D., and
COLORADO PERMANENTE MEDICAL GROUP, P.C.

Defendants.

From March 8, 2000, to March 16, 2000, a complete arbitration was held in which KAREN PACHECO, plaintiff above named, was claimant, and LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., and COLORADO PERMANENTE MEDICAL GROUP, P.C., defendants above named, were respondents. Claimant-plaintiff was represented by Gary S. Cohen, Esq. Respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., Timothy R. Collins, M.D., and Colorado Permanente Medical Group, P.C. were represented by Daniel M. Hubbard, Esq. and Teresa L. Thrailkill, Esq.

This arbitration was ancillary to Case Number 98 CV 2340, Courtroom 7, now pending in the District Court, City and County of Denver, State of Colorado.

The arbitrator heard and examined the evidence and considered the statements of counsel, and based thereon,

THE AWARD OF THE ARBITRATOR is as follows:

I. UNDERLYING FACTS.

A. Undisputed Facts.

February, 1997, Mark Pacheco, husband of claimant-plaintiff was admitted to Saint Joseph Hospital in Denver, Colorado for the treatment of pancreatitis. At Saint Joseph Hospital he was under the care and treatment of physicians employed by respondent-defendant Colorado Permanente Medical Group, P.C.

Colorado Permanente Medical Group, P.C. is a group of physicians who contract with the Kaiser Permenente Health Care Program to treat persons who are members of that plan. Respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., and Timothy R. Collins, M.D., are all physicians who are members of Colorado Permanente Medical Group, P.C. and are employees, or "servants," of that corporation. The respondent-defendant physicians were not involved in the treatment of Mark Pacheco during that first admission to Saint Joseph Hospital.

On February 14, 1997, Mark Pacheco was placed on total parenteral nutrition. Total parenteral nutrition is usually referred to as TPN. It is designed to provide the entire nutritional needs of the patient to which it is administered; however, due to a national shortage, and contrary to the instructions of the physician who ordered the TPN, that provided to Mark Pacheco did not contain multivitamins. The physician who initially ordered the TPN was not an employee of Colorado Permanente Medical Group, P.C. The fact that the TPN did not include multivitamins was noted in the hospital chart of Mark Pacheco.

Among the multivitamins which were not included in the TPN provided for Mark Pacheco was thiamine. This vitamin is essential to the Krebs cycle, a process in human cells by

which glucose and its derivative pyruvate is converted into energy. This process is essential to life. In the absence of thiamine the pyruvate which would otherwise be converted to energy instead becomes lactate. This constitutes the disease beriberi. If uncorrected it is fatal.

On February 28, 1997, Mark Pacheco was discharged from Saint Joseph Hospital and returned home. The TPN continued to be the principal source of nutrition for Mark Pacheco, although he received some clear liquids such as clear fruit juice by mouth. His condition deteriorated at home, and on March 17, 1997, he was readmitted to Saint Joseph Hospital. He died at the hospital on March 21, 1997.

Under the Kaiser plan certain physicians employed by Colorado Permanente Medical Group, P.C. are stationed at the hospital full time, and are responsible for the care of hospitalized Kaiser members during their respective tours of duty. On March 18 and 19, respondent-defendant Lawrence S. Allen, M.D., was on duty and was responsible for the care of Mark Pacheco. On March 20, 1997, Dr. Allen was relieved by respondent-defendant Michael K. Miller, M.D., who was responsible for the care of Mark Pacheco from that time until Mark Pacheco's death. On March 20, 1997, Dr. Miller asked respondent-defendant Timothy R. Collins, M.D. to see Mark Pacheco. Dr. Collins did so and made certain recommendations concerning his care.

Dr. Allen, Dr. Miller and Dr. Collins are all board-certified specialists in internal medicine. Dr. Collins is also board certified in pulmonology and critical care. The standards of care for their respective specialties are therefore national not local.

Mark Pacheco's condition deteriorated rapidly during his March, 1997, stay at Saint Joseph Hospital. It was the unanimous opinion of Dr. Allen, Dr. Miller and Dr. Collins that his condition was due to sepsis, which is generally

defined as a toxic condition resulting from the spread of bacteria or their products from a focus of infection.

During Mark Pacheco's hospital stay it was noticed that he suffered from a condition known as lactic acidosis. This condition is caused by an excess of lactate in the system. When initially observed the lactate level was 6.9. On subsequent observations it declined to 6.4 and then to 4.9. All of these levels are well above normal. The pH level shown by Mark Pacheco's blood tests remained high, showing a continued acid condition.

Prior to the time of Mark Pacheco's hospitalization and death, a number of articles had appeared in medical journals documenting a relationship between life-threatening lactic acidosis and a lack of thiamine in TPN. The articles pointed out rapid cures which had occurred after the administration of thiamine. These articles and their contents were not part of the common knowledge of internal medicine specialists, but were readily discoverable by searching medical literature.

Thiamine deficiency and beriberi are very rare in the United States because thiamine is amply available in the American diet. A number of the physicians who testified had had experience in treating suspected thiamine deficiency, primarily in alcoholics, but with one exception, none had seen or treated actual beriberi. The treatment for thiamine deficiency is the administration of thiamine, which is inexpensive and free from harmful side effects.

After the death of Mark Pacheco, an autopsy was performed. The pathologist reported, "A definitive immediate cause of death was not determined." The pathologist testified that this is quite unusual, occurring in from five to ten percent of cases in his experience. The pathology report indicated "several significant findings at autopsy which additively could have explained the patient's demise." These included an approximately 90% blockage of one of the coronary

arteries, chronic pancreatitis, a colonization of certain strains of staphylococcus bacteria on a Hohn catheter tip, and fatty changes in the liver.

B. Disputed Facts

A principal dispute among the parties is over the cause of death.

Claimant-plaintiff points out the lactic acidosis observed in Mark Pacheco during the later stages of his illness and the lack of findings confirming sepsis in the autopsy. One of complainant-plaintiff's experts called autopsy the "gold standard" for determining such matters. Claimant-plaintiff and her experts therefore deny that sepsis was the cause of Marl Pacheco's death.

These experts contend that the records of Mark Pacheco's final hospitalization confirm a diagnosis of wet beriberi or Shoshin beriberi. They testified that this condition was caused by the failure to include thiamine in the TPN provided for Mark Pacheco. In their view the small amount of clear fruit juice consumed by Mark Pacheco was insufficient to satisfy his needs for thiamine. They contend that the decreasing level of the lactate levels observed in Mark Pacheco, although not clearly explainable, was probably due to a general collapse of his system.

These experts assert that thiamine deficiency or beriberi was the cause of Mark Pacheco's death. They recognize that the autopsy did not confirm beriberi, but contend that this is because the autopsy did not include examination of Mark Pacheco's head where evidence of beriberi would have been found.

Claimant-plaintiff claims that respondent-defendant physicians had received actual knowledge of the lack of multivitamins in the TPN, or, in any event, should have known of it had they adequately examined Mark Pacheco's chart. She

and the experts testifying for her assert that there were several indications in the chart the multivitamins were missing. They contend that it was the duty of the respondent-defendants to know contents of the TPN, and point out that Dr. Miller did in fact review the TPN.

In the view of the claimant-plaintiff and the experts testifying for her, the knowledge the respondent-defendant physicians had or should have had concerning the lack of multivitamins in the TPN together with the observation of lactic acidosis should have lead them to conduct a literature search. Such a search would have revealed the medical journal articles and the relationship of the beriberi to Mark Pacheco's condition. If this had been done, claimant-plaintiff and her experts contend, the attending physicians would have administered thiamine and Mark Pacheco would have recovered in a few days or even perhaps in a few hours. Mark Pacheco could then have looked forward to a normal or near-normal life expectancy.

Respondent-defendants claim that Mark Pacheco's symptoms overwhelmingly point to sepsis. They contend that it is not uncommon that the actual organism involved in a case of sepsis is not identified. Certain of the outside experts called by respondent-defendants point to the colonization of staphylococcus bacteria on the Hohn catheter tip as the likely source of the infection; however, this view is not held by all of those testifying for respondent-defendants. It is not the view of Dr. Janet S. Kuhns, an infectious disease specialist who examined Mark Pacheco as a consultant.

Respondent-defendants and their experts maintain that the symptoms shown by Mark Pacheco were not consistent with beriberi. They point out that the lactate levels manifested by Mark Pacheco were declining rather than increasing. They interpret this to mean that the lactic acidosis suffered by Mark Pacheco was improving. This they contend is contrary to what would have been expected if lack of thiamine was the

culprit. They also contend that the presence of feces in Mark Pacheco's intestine indicates that he had nutrition beyond TPN and clear fruit juice.

Respondent-defendant physicians deny that they knew of the multivitamin shortage in 1997 or that they knew or had reason to know that the TPN supplied to Mark Pacheco did not contain multivitamins.

Respondent-defendants also point out that the lactate levels manifested by Mark Pacheco, even at their worst, were far below those reported in the literature in patients who had suffered from and were cured from thiamine deficiency as a result of lack of multivitamins in TPN.

As pointed out above, only one of the witnesses had actually seen or treated confirmed beriberi. This witness was Dr. Daniel Citron, who had encountered dry beriberi while serving with Doctors Without Borders in Thailand. His encounters with dry beriberi had led him to research wet beriberi and Shoshin beriberi. He testified that Mark Pacheco did not manifest the symptoms of beriberi.

II. CONCLUSIONS OF THE ARBITRATOR.

A. Cause of Death

The burden of proof is upon the claimant-plaintiff to prove by a preponderance of the evidence that the death of Mark Pacheco was due to a thiamine deficiency which in turn was caused by the lack of thiamine in Mark Pacheco's TPN. Although claimant-plaintiff produced some effective evidence in this regard, the arbitrator ultimately has concluded that the burden was not met.

In reaching this conclusion the following factors discussed above were particularly persuasive:

1. The lactate levels observed in Mark Pacheco were very substantially below those reported in the medical

journals in the cases of illness due to thiamine deficiency in TPN.

2. The decrease in the lactate levels in Mark Pacheco observed during the course of his final hospitalization is inconsistent with the thiamine deficiency theory. The explanation of a general breakdown is not convincing.

3. Dr. Citron testified that Mark Pacheco did not manifest the symptoms which are characteristic of beriberi. Dr. Citron appeared to be the witness most conversant with the disease as a result of his experiences and research in Thailand. His testimony was, therefore, particularly persuasive.

The arbitrator has also noted the evidence concerning the oral intake of the Mark Pacheco. The arbitrator makes no finding as to whether the fruit juice all parties agree he consumed was sufficient to meet his needs; however, those needs are admittedly small. The arbitrator makes no finding as to whether Mark Pacheco consumed any solid food.

On the basis of the foregoing it is the conclusion of the arbitrator that it has not been established that it is more probable than not that the death of Mark Pacheco was caused by thiamine deficiency.

The arbitrator is not unaware of the problems in confirming a diagnosis of sepsis. The failure to establish a definite focus of infection even on autopsy is particularly disturbing. It was, however, the diagnosis arrived at by all treating physicians, and is consistent with the conditions observed in Mark Pacheco during his last illness. As the cause of the death of Mark Pacheco, sepsis is at least as probable as is thiamine deficiency. The claimant-plaintiff bears the burden of proof, not the respondent-defendants.

B. Standard of Care and Life Expectancy.

The arbitrator's finding regarding the cause of death makes detailed findings concerning compliance with the standard of

care and life expectancy unnecessary. The arbitrator's conclusion is that the care provided to Mark Pacheco by respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., and Timothy R. Collins, M.D. was not below the standard of care required of internal medicine specialist physicians at the time such care was furnished. The life expectancy of Mark Pacheco was substantially less than the average of men of his age.

C. Costs and Costs of Arbitration.

The respondents-defendants are entitled to costs in this matter to the extent that they are recoverable in a normal civil action.

The parties have agreed that the costs of arbitration and of the arbitration location should be divided equally between the parties unless the arbitrator rules otherwise. This arbitration was ordered on application of the respondent-defendants and over the objection of the claimant-plaintiff. It is doubtful that the use of arbitration in this instance has materially reduced the expense of litigating the case, as the parties have conducted the matter in essentially the same manner as a court trial. The costs of arbitration and the arbitration location in this instance are basically added expenses. For this reason the arbitrator will not change the agreement of the parties, and the costs of arbitration and the arbitration location will be divided equally between the parties.

III. AWARD

The determination of the arbitrator is as follows:

1. Claimant-plaintiff Karen Pacheco shall have no recovery against the respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., Timothy R. Collins, M.D., and Colorado Permanente Medical Group, P.C.

2. Respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., Timothy R. Collins, M.D., and

Colorado Permanente Medical Group, P.C. shall have recovery against claimant-plaintiff Karen Pacheco for those costs normally allowed in a civil action in the State of Colorado.

3. The costs of this arbitration in the amount of $7,757.50 and the costs of the arbitration location shall be paid in two equal shares by the parties in accordance with their agreement.

Dated March 22, 2000.

/s/ Robert A. Behrman
ROBERT A. BEHRMAN
Arbitrator

APPENDIX E

DISTRICT COURT, CITY AND COUNTY OF DENVER
STATE OF COLORADO
Courtroom 7

[Filed Dec. 11, 1998]

Case No. 98CV2340

KAREN PACHECO,

Plaintiff,

v.

SAINT JOSEPH HOSPITAL, INC., LAWRENCE S. ALLEN, M.D., JOHN C. FARRIN, M.D., SCOTT H. KUBOWICZ, M.D., MICHAEL K. MILLER, M.D. and PETER D. RILEY, M.D.,

Defendants.

ORDER GRANTING MOTION TO COMPEL ARBITRATION

In this medical malpractice case, plaintiff sues for the wrongful death of her husband, Mark Pacheco. Defendant St. Joseph Hospital, Inc. has already been dismissed on motion. The remaining individual defendants are doctors who allegedly provided care to Mark Pacheco. Mr. Pacheco had medical coverage through Kaiser Foundation Health Plan of Colorado ("Kaiser"). Pursuant to a clause in the medical and hospital service agreement between Mr. Pacheco and Kaiser, the individual defendants now move to dismiss this action or compel arbitration.

The agreement to arbitrate is set forth in defendants' motion and applies by its terms to "any claim of medical malpractice" asserted by "a Member or by a Member's heir or personal representative or by a person claiming that a duty to him or her arises from a Member's relationship with"

(Kaiser). The form of the arbitration agreement does not comply with C.R.S. § 13-64-403(4) of the Colorado Health Care Availability Act ("HCAA") because it lacks the notice in bold-faced type required by that section. In *Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218, 1226 (Colo. 1996), the Colorado Supreme Court held that the Kaiser arbitration provision was unenforceable due to failure to comply with the HCAA. Defendants argue that the Federal Arbitration Act ("FAA") preempts the HCAA in this regard, a question explicitly not reached by the Supreme Court in *Evans*. Defendants cite three orders from state district court judges and one from a federal district court judge holding that this very arbitration clause is enforceable because the FAA preempts the limits on arbitration clauses contained in the HCAA. These cases follow from the supremacy of the FAA declared by the United States Supreme Court in *Doctor's Associates v. Casarotto*, 517 U.S. __, 134 L.Ed.2d 902, 116 S.Ct. 1652 (1996).

In response, plaintiff urges four reasons why she should not be compelled to arbitrate her wrongful death claim. First, plaintiff argues that she was not a party to the arbitration agreement and therefore is not bound by it. However, I find that the language of the arbitration agreement clearly shows the intention of the parties that claims by people in plaintiff's position were intended to be governed. The agreement governs claims by an heir or personal representative or by a person claiming that a duty to him or her arises from Mr. Pacheco's relationship with Kaiser. Plaintiff's argument that she is technically not an "heir" as defined in the Wrongful Death Act is unpersuasive; interpreting the words of the agreement in accord with their plain and ordinary meaning mandates that the word "heir" be read to include a surviving spouse. As a matter of law, plaintiff is bound by the arbitration clause.

Plaintiff next argues that her complaint operates as a rescission of the arbitration clause in Mr. Pacheco's agreement with Kaiser. Nothing in the agreement suggests that filing a complaint could operate as a rescission. Further, plaintiff has failed to establish that any such rescission would be timely in relation to when Mr. Pacheco became bound by the agreement.

Plaintiff's most creative argument for escaping the effect of the arbitration clause is based on the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The McCarran-Ferguson Act provides that no federal law may preempt a state law enacted for the purpose of regulating the business of insurance. Plaintiff argues that section 403 of the HCAA regulates the business of insurance and therefore cannot be preempted by the FAA. I disagree. The HCAA is, by its terms, a tort reform statute. Although 13-64-403(1) governs the activities of medical malpractice insurers, the section generally applies to "health care providers," not to insurance companies. The United States Supreme Court has established a three factor test for determining whether a state law regulates the business of insuranee. *Union Labor life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). The subject provision of the HCAA manifestly does not meet the third part of the test because the practice regulated by the statute is not limited to entities within the insurance industry; rather, the statute applies to "health care providers." Kaiser may be an insurer as well as a health care provider, but the statute applies to all health care providers, not just health maintenance organizations; thus, the statute does not regulate the business of insurance. Therefore, I conclude that the McCarran-Ferguson Act does not apply and that the FAA does preempt the limitations on arbitration agreements contained in the HCAA.

Finally, plaintiff argues that the Kaiser agreement is, by its terms, subject to Colorado law and not to the Federal Arbitration Act. In support of this argument, plaintiff points

to sections of the agreement which refer to the Colorado Uniform Arbitration Act and Colorado law as being controlling. The agreement does not include a reference to the FAA. That argument is specifically refuted by the numerous federal cases upholding the supremacy of the FAA which are cited in defendants' reply brief. The FAA would be of little consequence if it applied only in situation where the parties' contract specifically referenced it.

Having rejected each of plaintiff's theories that she is not subject to the arbitration clause, I grant defendants' motion to compel arbitration. Further proceedings in this action are stayed pending completion of the arbitration of plaintiff's claims. The jury trial scheduled for March 15, 1999 is vacated.

Plaintiff's motion to require compliance with Rule 16 and 26 is deemed moot. Plaintiff's motion for reconsideration of my order dismissing her claims against St. Joseph Hospital, Inc. is denied.

Dated this 11th day of December, 1998.

BY THE COURT

/s/ Joseph E. Meyer
JOSEPH E. MEYER III
District Court Judge

cc: Montoya
Cohen

APPENDIX F

COLORADO SUPREME COURT
MONDAY, JUNE 30, 2003

Case No. 01SC744

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, Colorado 80203
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 00CA1624

LAWRENCE S. ALLEN, M.D.; MICHAEL K. MILLER, M.D.;
TIMOTHY R. COLLINS, M.D.; and
COLORADO PERMANENTE MEDICAL GROUP, P.C.,
Petitioners,

v.

KAREN PACHECO,
Respondent.

PETITIONS FOR REHEARING

Petition for Rehearing DENIED. EN BANC.

JUSTICE KOURLIS and JUSTICE BENDER would grant the Petition.

APPENDIX G

FEDERAL AND STATE STATUTES

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

15 U.S.C. § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as

amended [15 U.S.C.A. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

(Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.)

Colo. Rev. Stat. § 13-64-403

(1) It is the intent of the general assembly that an arbitration agreement be a voluntary agreement between a patient and a health care provider and no medical malpractice insurer shall require a health care provider to utilize arbitration agreements as a condition of providing medical malpractice insurance to such health care provider. Making the use of arbitration agreements a condition to the provision of medical malpractice insurance shall constitute an unfair insurance practice and shall be subject to the provisions, remedies, and penalties prescribed in part 11 of article 3 of title 10, C.R.S.

(1.5) Exemplary damages may be awarded in any arbitration proceeding held pursuant to this section in accordance with section 13-21-102(1) to (3) and (6). Any award of exemplary damages in a proceeding held pursuant to this section may be modified by the district court upon petition to the district court alleging that the award of such damages was either excessive or inadequate.

(2) Any agreement for the provision of medical services which contains a provision for binding arbitration of any dispute as to professional negligence of a health care provider that conforms to the provisions of this section shall not be deemed contrary to the public policy of this state, except as provided in subsection (10) of this section.

(3) Any such agreement shall have the following statement set forth as part of the agreement: "It is understood that any claim of medical malpractice, including any claim that medical services were unnecessary or unauthorized or were

improperly, negligently, or incompetently rendered or omitted, will be determined by submission to binding arbitration in accordance with the provisions of the "Uniform Arbitration Act of 1975", part 2 of article 22 of title 13, Colorado Revised Statutes, and not by a lawsuit or resort to court process except as Colorado law provides for judicial review of arbitration proceedings. The patient has the right to seek legal counsel concerning this agreement, and has the right to rescind this agreement by written notice to the physician within ninety days after the agreement has been signed and executed by both parties unless said agreement was signed in contemplation of the patient being hospitalized, in which case the agreement may be rescinded by written notice to the physician within ninety days after release or discharge from the hospital or other health care institution. Both parties to this agreement, by entering into it, have agreed to the use of binding arbitration in lieu of having any such dispute decided in a court of law before a jury."

(4) Immediately preceding the signature lines for such an agreement, the following notice shall be printed in at least ten-point, bold-faced type:

NOTE: BY SIGNING THIS AGREEMENT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL BINDING ARBITRATION RATHER THAN BY A JURY OR COURT TRIAL.

YOU HAVE THE RIGHT TO SEEK LEGAL COUNSEL AND YOU HAVE THE RIGHT TO RESCIND THIS AGREEMENT WITHIN NINETY DAYS FROM THE DATE OF SIGNATURE BY BOTH PARTIES UNLESS THE AGREEMENT WAS SIGNED IN CONTEMPLATION OF HOSPITALIZATION IN WHICH CASE YOU HAVE NINETY DAYS AFTER DISCHARGE OR RELEASE FROM THE HOSPITAL TO RESCIND THE AGREEMENT.

NO HEALTH CARE PROVIDER SHALL WITHHOLD THE PROVISION OF EMERGENCY MEDICAL SERVICES TO ANY PERSON BECAUSE OF THAT PERSON'S FAILURE OR REFUSAL TO SIGN AN AGREEMENT CONTAINING A PROVISION FOR BINDING ARBITRATION OF ANY DISPUTE ARISING AS TO PROFESSIONAL NEGLIGENCE OF THE PROVIDER.

NO HEALTH CARE PROVIDER SHALL REFUSE TO PROVIDE MEDICAL CARE SERVICES TO ANY PATIENT SOLELY BECAUSE SUCH PATIENT REFUSED TO SIGN SUCH AN AGREEMENT OR EXERCISED THE NINETY-DAY RIGHT OF RESCISSION.

(5) Once signed, the agreement shall govern all subsequent provision of medical services for which the agreement was signed until or unless rescinded by written notice. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor. Where the agreement is one for medical services to a minor, it shall not be subject to disaffirmation by the minor if signed by the minor's parent or legal guardian.

(6) The patient shall be provided with a written copy of any agreement subject to the provisions of this section at the time that it is signed by the parties.

(7) No health care provider shall refuse to provide medical care services to any patient solely because such patient refused to sign such an agreement or exercised the ninety-day right of rescission.

(8) No health care provider shall withhold the provision of emergency medical services to any person because of that person's failure or refusal to sign an agreement containing a provision for binding arbitration of any dispute arising as to professional negligence of the provider.

(9) If a health care provider refuses to provide medical care services to any patient in violation of subsection (7) of this

section or withholds the provision of emergency medical services to any person in violation of subsection (8) of this section or fails to comply with the requirements of subsection (3) or (4) or both of this section, such refusal or withholding of services shall constitute unprofessional conduct as such term is used under the relevant licensing statute governing that particular care provider, and the appropriate authority which conducts disciplinary proceedings relating to such health care provider shall consider and take appropriate disciplinary action against such health care provider as provided under the relevant licensing statute.

(10) Even where it complies with the provisions of this section, such an agreement may nevertheless be declared invalid by a court if it is shown by clear and convincing evidence that:

(a) The agreement failed to meet the standards for such agreements as specified in this section; or

(b) The execution of the agreement was induced by fraud; or

(c) The patient executed the agreement as a direct result of the willful or negligent disregard of the patient's right to refrain from such execution; or

(d) The patient executing the agreement was not able to communicate effectively in spoken and written English, unless the agreement is written in his native language.

(11) No such agreement may be submitted to a patient for approval when the patient's condition prevents the patient from making a rational decision whether or not to execute such an agreement.

(12) For the purposes of this section:

(a)(I) "Health care provider" means any person licensed or certified by the state of Colorado to deliver health care and any clinic, health dispensary, or health facility

licensed by the state of Colorado. The term includes any professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state.

(II)(A) Nothing in this paragraph (a) shall be construed to permit a professional service corporation, as described in section 12-36-134, C.R.S., to practice medicine.

(B) Nothing in this paragraph (a) shall be construed to otherwise create an exception to the corporate practice of medicine doctrine.

(b) "Professional negligence" means a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of personal injury or wrongful death, as long as such services are within the scope of services for which the provider is licensed.

Added by Laws 1988, S.B.143, § 1. Amended by Laws 1989, H.B.1294, § 3, eff. July 1, 1989; Laws 1995, H.B.95-1090, § 7, eff. March 9, 1995; Laws 2003, Ch. 240, § 5, eff. July 1, 2003.

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No. 03-642

IN THE

Supreme Court of the United States

LAWRENCE S. ALLEN, *et al.*,

Petitioners,

v.

KAREN PACHECO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Contrary to Petitioners' position, the issue herein is relatively simple and was properly resolved by the Colorado Supreme Court in accordance with applicable principles of law. The issue below concerned whether the Petitioners were entitled to specifically enforce a provision requiring arbitration of medical malpractice disputes contained in the insurance contract between Karen Pacheco's ("Pacheco") deceased husband and Kaiser Foundation Health Plan of Colorado ("Kaiser"), since the arbitration provision violated the requirements of the Colorado Health Care Availability Act ("HCAA"). The Colorado Supreme Court held that enforcement of the insurance contract between Mr. Pacheco and Kaiser constituted the "business of insurance," and that the HCAA, to the extent it regulated the enforceability of a provision of the Kaiser insurance contract, was a law enacted for the purpose of regulating the "business of insurance." Both of these holdings follow well-settled law. Contrary to Petitioners' argument, the Colorado Supreme Court did not devise a new test to decide this case. Pet. 9.

NO ISSUE RAISED BY THE PETITION WARRANTS REVIEW

The issue raised by the Petitioners is whether the Colorado Supreme Court correctly held that the Federal Arbitration Act ("FAA") was reverse-preempted by the first clause of section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012. In order for the McCarran-Ferguson Act to reverse-preempt a federal statute, three things must be shown, *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999), as follows:

1. The federal statute being preempted does not specifically relate to the "business of insurance." In this case there is no dispute that this first requirement has been met, since the FAA does not specifically relate to the "business of insurance." Petitioners do not dispute the satisfaction of this requirement.

2. The state law was enacted for the purpose of regulating the "business of insurance." The Colorado Supreme Court found that this requirement was satisfied. Petitioners' argument is solely based upon this holding.

3. The federal statute operates to invalidate, impair, or supersede the state law. In this case, there is no dispute that the FAA, if it were applicable, would operate to invalidate, impair, or supersede the HCAA requirements regarding an enforceable arbitration agreement in a health insurance contract.

The second element of McCarran-Ferguson reverse-preemption discussed above contains two components, which must, in turn, be separately analyzed. The first inquiry is whether a particular activity is part of the "business of insurance." If the answer to this first inquiry is yes, then a second, separate and distinct inquiry is necessary – whether the state law in question was enacted for the purpose of regulating the "business of insurance." *Owensboro National Bank v. Stephens*, 44 F.3d 388, 3922 (6th Cir. 1994), *cert. denied*, 517 U.S. 1119 (1996). The fundamental fallacy of Petitioners' contentions and argument is that they confuse

and mix these two separate questions.[1] While the factors set forth in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), may, in some circumstances, be relevant in first clause cases to the threshold inquiry regarding whether the subject practice/activity constitutes the "business of insurance," they have no applicability to the question of whether a state law was enacted for the purpose of regulating the "business of insurance."

Since the issue herein concerns the enforceability of a provision contained in the Kaiser insurance contract[2], no issue exists regarding whether the subject activity (enforcement of a provision of the insurance contract) constitutes the "business of insurance." Thus, Petitioners' argument regarding the failure of the Colorado Supreme Court to specifically discuss the *Pireno* factors is nothing more than a red herring.

Petitioners' arguments regarding the second inquiry, *i.e.*, whether the HCAA is a state law enacted for the purpose of regulating the "business of insurance," are also fundamentally flawed. The cases relied upon by the Petitioners, such as *American Bankers Insurance Co. v. Crawford*, 757 So. 2d

1. For example, Petitioners incorrectly argue that "the real issue in these first-clause cases is whether the *Pireno* factors guide the court's evaluation of state law." Pet. 17. Petitioners are wrong.

2. Petitioners do not challenge the holding that the Kaiser agreement is an insurance contract, which holding is in accord with prevailing law. *See, e.g., Washington Physicians Service Association v. Gregoire*, 147 F.3d 1039, 1046 (9th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999); *Smith v. PacifiCare Behavioral Health of California, Inc.*, 113 Cal. Rptr. 2d 140, 154 (Cal. App. 2001), *cert. denied*, 537 U.S. 818 (2002).

1125 (Ala. 1999), are factually distinguishable since they concern statutes which prohibit the enforceability of arbitration agreements in **every** contract in the state. The purpose of the Alabama statute is to prohibit the enforcement of arbitration provisions in Alabama contracts. Its intended purpose was not, even in part, to regulate the "business of insurance." The HCAA, in contrast, is much more limited in scope. It is not generally applicable to Colorado contracts. In fact, as recognized in the first part of the Colorado Supreme Court's opinion, Colorado has a strong public policy in favor of the enforceability of arbitration provisions. Pet. App. 4a-11a.

Review of the Colorado Supreme Court's decision is not warranted in this case since not only was the McCarran-Ferguson reverse-preemption issue correctly decided, but, contrary to Petitioners' arguments, no real conflict exists with decisions of other courts, in the context of the issues presented.

ENFORCEABILITY OF A PROVISION OF THE KAISER INSURANCE CONTRACT INVOLVES THE "BUSINESS OF INSURANCE"

The core of the "business of insurance" is the relationship between the insurer and insured, including the interpretation, performance and enforcement of the policy which is or could be issued. *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). While the determination of what constitutes the "business of insurance" can, in some circumstances, be complex, "[t]here can be no doubt that the actual performance of an insurance contract falls within the 'business of insurance.'" *United States Department of Treasury v. Fabe*, 508 U.S. 491, 503 (1993). Since the issue in the instant case concerns the actual performance of a term of the Kaiser

insurance contract, there can be no doubt that it falls within the "business of insurance."

Many, if not most, of the cases in which issues have arisen regarding McCarran-Ferguson reverse-preemption under the first clause of section 2(b) do not directly concern the actual performance or enforcement of a particular provision of an insurance contract. Thus, in those cases, unlike the instant case, a threshold determination must be made as to whether the activity or practice constitutes the "business of insurance." The *Pireno* factors may be relevant in making that threshold determination in those cases. They are not relevant in this case.

As this Court made clear in *Fabe*, consideration of the *Pireno* factors in a case concerning the actual enforcement or performance of an insurance contract "would be mere formalism," since all three prongs of *Pireno* are satisfied when the issue concerns the performance or enforcement of the insurance contract. *Fabe*, 508 U.S. at 503-04. That is precisely the case herein.

The federal cases relied upon by Petitioners to support their assertion that there is conflict and confusion in the lower courts over whether and how to apply the *Pireno* factors in cases involving the first clause of section 2(b) do not concern the enforceability of a term of an insurance contract. For example, *Owensboro National Bank v. Stephens*, *supra*, involved a state statute barring bank holding companies from acting as insurance agents; *Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037 (7th Cir. 1998), concerned the question of whether the financing of insurance premiums was part of the "business of insurance;" *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160 (3d Cir. 2001), concerned whether commercial advertising by an insurance company

constituted the "business of insurance;" *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co. Inc.*, 50 F.3d 1486 (9th Cir. 1995), *cert. denied*, 516 U.S. 964 (1995), concerned whether the McCarran-Ferguson Act precluded the application of RICO to an insurance broker's alleged wrongdoing.

The instant case, therefore, contrary to Petitioners' contentions, does not provide an opportunity for this Court to settle the alleged confusion and conflict, if any, in the lower courts regarding the applicability of the *Pireno* factors to the determination of what constitutes the "business of insurance." Accordingly, review of the Colorado Supreme Court's determination that the enforcement of the arbitration provision in the Kaiser insurance contract constituted the "business of insurance" should be denied.

THE HCAA IS A STATUTE ENACTED FOR THE PURPOSE OF REGULATING THE "BUSINESS OF INSURANCE"

Since enforcement of a term of the Kaiser insurance contract, namely the arbitration provision, involves the "business of insurance," the next inquiry is whether the HCAA, which invalidates this arbitration provision, was enacted to regulate the "business of insurance."[3] The decision

3. A distinction must be made between the "business of insurance" and the business of insurance companies. *SEC v. National Securities, Inc.*, 393 U.S. at 459-60. A further distinction must be made from ERISA cases which only require a state law to regulate "insurance" in order to be saved from preemption. *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. __, 123 S. Ct. 1471, 1476 n.1 (2003). Justice Kourlis confused these concepts in her dissent, where she focused on statutes "aimed at the business of regulating insurance." Pet. App. 28a.

of the Colorado Supreme Court that this provision of the HCAA was enacted to regulate the "business of insurance" was correct, in the circumstances of this case.[4]

The Alabama statute involved in *Crawford* is a general anti-arbitration statute. It applies to **every** contract governed by Alabama law. While the Alabama Supreme Court may have analyzed this general anti-arbitration statute under the *Pireno* factors, which Pacheco submits is incorrect, it reached the correct decision since it is clear that the general anti-arbitration statute was not enacted, even in part, for the purpose of regulating the "business of insurance." It was enacted to prohibit the enforceability of every arbitration provision in Alabama.

Similarly, the anti-arbitration statutes of Texas, New York, Montana, Illinois and Colorado were statutes regulating the general method of handling **every** contract dispute in those states, and were not statutes enacted to regulate the "business of insurance." *Hamilton Life Insurance Co. v. Republic National Life Insurance Co.*, 408 F.2d 606, 611 (2d Cir. 1969); *Hart v. Orion Insurance Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971).

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4. It must be noted that prior to being faced with this McCarran-Ferguson reverse-preemption issue, the Colorado Supreme Court had occasion to consider the applicability of the HCAA to HMOs. *Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218, 1227-28 (Colo. 1996). In that case, the Colorado Supreme Court held that the Colorado legislative mandate was that HMOs must comply with the arbitration provision of the HCAA. The holding of the Colorado Supreme Court in the instant case is consistent with the holding in *Evans* regarding the legislative intent of the HCAA.

In 1975, after the decision in *Hart*, Colorado adopted the Uniform Arbitration Act. Colo. Rev. Stat. §§ 13-22-201, *et seq.* Since the enactment of the Colorado Uniform Arbitration Act in 1975, the Colorado courts have consistently held that the public policy of Colorado is strongly in favor of arbitration, just like the federal policy under the FAA is strongly in favor of arbitration. The Colorado Supreme Court reemphasized in the instant case that Colorado's strong policy is in favor of arbitration by holding that any doubts about the scope of an arbitration clause must be resolved in favor of arbitration. In fact, arbitration must be compelled in Colorado unless a court can say "with positive assurance" that the arbitration clause is not susceptible to any interpretation encompassing the subject matter of the dispute. Pet. App. 5a-6a.

In contrast to the Alabama statute which contains a blanket prohibition against the enforceability of arbitration clauses in any contract, the HCAA does not prohibit arbitration. The HCAA is not an anti-arbitration statute. Rather, the HCAA merely imposes certain requirements before an arbitration clause can be enforced in certain very limited areas, including in health insurance contracts.

Simply stated, laws "aimed at protecting or regulating [the insurer-insured] relationship, directly or indirectly, are laws regulating the 'business of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. at 460. "The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing or controlling the business of insurance." *Fabe*, 508 U.S. at 505.

The HCAA regulates the "business of insurance" since it applies to the processing of disputed claims, which has a substantial effect upon the insurer-insured relationship. *Standard Security Life Insurance Co. v. West*, 267 F.3d 821, 823 (8th Cir. 2001); *Smith v. PacifiCare Behavioral Health of California, Inc., supra* at 156-57.

The Ohio priority statute involved in *Fabe* concerned the priorities of creditors' claims in a proceeding to liquidate an insolvent insurance company. This Court held that to the extent the Ohio statute protected policyholders, it was a law regulating the "business of insurance," which had priority over the federal bankruptcy statutes. To the extent, however, the Ohio statute regulated the priority of non-policyholder creditors, it was not a law regulating the "business of insurance," and was preempted by the federal bankruptcy statutes. Thus, this Court held that a state statute could have multiple purposes, some of which did not regulate the "business of insurance." McCarran-Ferguson reverse-preemption was applicable to the extent, and only to the extent, the statute regulated the "business of insurance."

Significantly, this Court in *Fabe* rejected the position of the dissenting judge on the Sixth Circuit Court of Appeals, who believed that the Ohio priority statute was not a law enacted for the purpose of regulating the "business of insurance" since, *inter alia*, it was "not confined to policyholders, but govern[ed] the rights of all creditors." *Fabe*, 508 U.S. at 498. The Petitioners herein make a similar argument – the HCAA is not confined to arbitration clauses in health insurance contracts, but also extends to arbitration clauses in non-insurance contracts with medical service providers. Since no issue herein concerns the enforceability of the HCAA with respect to a non-insurance contract with a

medical service provider, and since a statute enacted for the purpose of regulating the "business insurance" need not be confined to the rights of insurance policyholders,[5] no good reason exists for this Court to review the decision of the Colorado Supreme Court.

CONCLUSION

The Colorado Supreme Court correctly decided the McCarran-Ferguson Act issues in this case. Moreover, even if this Court desired to reconsider the applicability of the *Pireno* factors to cases under the first clause of section 2(b), it should do so in a case which does not involve the enforceability of a term of the insurance contract, since all *Pireno* factors are satisfied in such a case. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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5. A state statute "regulat[ing] the business of insurance" need not be in the form of an insurance code or be an act relating only to insurance in order for McCarran-Ferguson reverse-preemption to apply. *Mutual Reinsurance Bureau v. Great Plains Mutual Insurance Co., Inc.*, 969 F.2d 931, 934 (10th Cir. 1992), *cert. denied*, 506 U.S. 1001 (1992).

(7)

No. 03-642

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.,

Petitioners,

v.

KAREN PACHECO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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REPLY BRIEF

The Colorado Supreme Court has determined that the McCarran-Ferguson Act saves state laws that restrict an insurer's use of arbitration from preemption under the Federal Arbitration Act ("FAA"), even if the state law is not specifically directed at insurers. As a result, the Colorado Supreme Court has gone further than any other court to date in permitting states to restrict the use of arbitration in insurance contracts. The petition demonstrates that the Colorado Supreme Court's decision conflicts with decisions of the Alabama Supreme Court and the Second and Tenth Circuits, which hold that the McCarran-Ferguson Act does not save state anti-arbitration statutes that are not specifically directed at insurers.

The petition also demonstrates substantial disagreement about whether, at a more fundamental level, state law that restricts the use of arbitration can ever properly be deemed to regulate the business of insurance. The Colorado Supreme Court held that it could, because restrictions upon arbitration, in its view, "further the interests of . . . policyholders." Pet. App. 16a. But other courts have concluded that a different set of factors, namely those set forth in *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982), should be addressed in determining whether any given state statute regulates the business of insurance. Had the Colorado Supreme Court faithfully applied the *Pireno* factors, it would have concluded, as the Alabama Supreme Court did, that a state statute that restricts the use of arbitration in insurance contracts does not regulate the "business of insurance" within the meaning of the first clause of section 2(b) of the McCarran-Ferguson Act. See Pet. 18-19.

By expressly refusing to apply the *Pireno* factors to a case arising under the first clause of section 2(b) (Pet. App. 14a n.8), the Colorado Supreme Court exacerbated a mature

conflict over the proper test for determining whether a state law has been enacted "for the purpose of regulating the business of insurance" under the first clause of section 2(b) of the McCarran-Ferguson Act. Although the Colorado Supreme Court cited this Court's decision last Term in *Kentucky Association of Health Plans, Inc.* v. *Miller*, 538 U.S. 329, 123 S. Ct. 1471 (2003), as grounds for abandoning any consideration whatsoever of *Pireno* in first clause cases, the Colorado Supreme Court concomitantly ignored the test that this Court set forth to replace consideration of the *Pireno* factors. Instead, it adopted a broad new test that no other court has applied, and that, as the dissenting Justices rightly noted, allows the McCarran-Ferguson Act's limited savings clause to "swallow federal preemption under the Supremacy Clause." Pet. App. 28a.

The decision below thus confirms the need for a clear statement from this Court, comparable to that provided last Term for ERISA in *Kentucky Association*, of how lower courts are to determine whether a state statute is one "enacted for the purpose of regulating the business of insurance" within the meaning of the first clause of section 2(b) of the McCarran-Ferguson Act. The significance of the issue presented is plain. As the *amicus* briefs filed by the Reinsurance Association of America, the American Association of Health Plans, the Civil Justice Association of California and the California Chamber of Commerce make clear, the insurance industry relies heavily on arbitration to resolve disputes efficiently and economically. In instances where parties resort to arbitration, successful claimants receive quicker payments, and the resources saved by avoiding conventional litigation permits insurance companies to offer more comprehensive coverage at lower cost. Accordingly, it is of vital importance to the insurance industry that insurers be able to predict the enforceability of such restrictions. Yet under current law, in which state and federal courts apply different legal standards, insurers do not know

whether their agreements to arbitrate, though lawful under the FAA, will be deemed unenforceable in light of state law.

Each of the considerations by which this Court traditionally evaluates a petition for writ of certiorari thus supports a grant of the petition. Respondent's efforts to distinguish the decisional conflicts are unpersuasive.

A. Respondent Fails To Distinguish The HCAA From The Statutes At Issue In *Crawford*, *Hart*, and *Orion*, None Of Which Is Specifically Directed At Insurers.

Respondent argues that the anti-arbitration statutes at issue in *American Bankers Insurance Co. of Florida* v. *Crawford*, 757 So. 2d 1125 (Ala. 1999), *Hamilton Life Insurance Co. of New York* v. *Republic National Life Insurance Co.*, 408 F.2d 606, 611 (2d Cir. 1969), and *Hart* v. *Orion Insurance Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971) are distinguishable from the HCAA because those statutes apply generally to all contracts, while the HCAA applies only to contracts with health care providers for medical services. Opp. 7-8. The distinction is one without a difference. Neither the HCAA nor the statutes at issue in *Crawford*, *Hamilton*, and *Hart* is specifically directed toward insurers. Pet. 13-14. The Colorado Supreme Court found that the HCAA arbitration restrictions were saved because they "directly regulate" (Pet. App. 15a) insurance contracts. But the Alabama Supreme Court and the Second and Tenth Circuit found that such direct regulation of insurance contracts was not enough. Indeed, the Alabama Supreme Court reached that conclusion even though Alabama's general anti-arbitration statute was incorporated by reference into the Alabama insurance code. *Crawford*, 757 So. 2d at 1136. As the dissenting Justices noted below, the HCAA is in all material respects "a law of general application," and the Colorado Supreme Court therefore should have followed the lead of these other courts. Pet. App. 27a. Its failure to do so alone warrants review by this Court.

Respondent then argues that the HCAA regulates the "business of insurance" because when applied to disputed claims it has a "substantial effect upon the insurer-insured relationship." Opp. 9. The plain language of Section 2(b), however, covers only state statutes enacted with the "purpose" – and not merely the "effect" – of regulating the business of insurance. And in any event, if the McCarran-Ferguson Act did save any state law that has a "substantial effect" upon insurance contracts, there should be no difference in its application here and in *Crawford*, *Hamilton*, and *Hart*, since the statutes in these cases all have the same effect (substantial or not) on insurance contracts. Respondent's "substantial effects" argument does nothing to distinguish those cases.

Respondent also argues that in *United States Department of Treasury* v. *Fabe*, 508 U.S. 491 (1993), this Court acknowledged that a state statute may have multiple purposes, and held that so long as one of the purposes is to regulate the business of insurance, the first clause of section 2(b) is satisfied. Opp. 9. Respondent misconstrues *Fabe*. In *Fabe*, the Court merely observed that different provisions within the same broad statute could have different purposes. The Court did not hold that a single provision that made no express reference to regulating insurers, and that was not specifically directed at insurers, could nevertheless be deemed a provision enacted for the purpose of regulating the business of insurance. See *Fabe*, 508 U.S. at 509-10.

Respondent thus fails to distinguish the threshold conflict presented here: To be a law enacted "for the purpose of regulating the business of insurance," must the law be specifically directed at insurers? The distinctions that respondent attempts to draw between the HCAA and the statutes in *Crawford*, *Hamilton*, and *Hart* are only semantic. None of these cases involves a state law specifically directed at insurers. This Court should grant review to resolve the

conflict between these decisions, and clarify the legal standards for interpreting the McCarran-Ferguson Act.

B. Respondent Fails To Refute The Confusion And Uncertainty Surrounding The Proper Test For Applying The First Clause Of Section 2(b) Of The McCarran-Ferguson Act.

The foregoing conflict is sufficient to justify granting the petition. But plenary review is also warranted to address whether state arbitration restrictions, even if specifically directed at insurers, may be deemed to be laws for the purpose of regulating the business of insurance. Not only is this question unsettled, but so is the test to be applied in attempting to answer it. See Pet. 15-19 & nn.2-4. The significant and acknowledged confusion in the lower courts regarding the applicable test for applying the first clause of section 2(b) of the McCarran-Ferguson Act is an additional and important reason to grant the petition.

Respondent does not deny that the lower courts are divided over the applicability of the *Pireno* factors in cases involving the first clause of section 2(b) of the McCarran-Ferguson Act. Nor does respondent deny that this Court's decision last Term in *Kentucky Ass'n*, 123 S. Ct. at 1479, compounded that confusion by making a "clean break" from the *Pireno* factors in evaluating whether state laws "regulate insurance" under ERISA. Pet. 19-20. The Colorado Supreme Court evidently concluded that this Court's rationale for rejecting the *Pireno* factors in the context of ERISA's saving clause applies with equal force to the first clause of section 2(b) of the McCarran-Ferguson Act. Pet. App. 14a n.8. Yet the Colorado Supreme Court replaced the *Pireno* factors with a new test that is wholly untethered to the plain language of section 2(b).

Respondent neither defends the Colorado Supreme Court's new test nor denies that it compounds the confusion in the lower courts over the proper test. Respondent instead

advances two related arguments as to why this case is not the best vehicle for addressing that confusion.

First, Respondent argues that this case is unique because "[m]any, if not most, of the cases" involving confusion over the proper test for applying section 2(b) "do not directly concern the actual performance or enforcement of a particular provision of an insurance contract." Opp. 5. This is not true. Numerous state and federal cases involving the application of the *Pireno* factors have arisen in the context of an underlying dispute over the enforcement of an arbitration provision in an insurance contract. See, *e.g.*, *Crawford*, 757 So. 2d at 1133; *Standard Sec. Life Ins. Co. of N.Y.* v. *West*, 267 F.3d 821, 823-24 (8th Cir. 2001) (per curiam); *Mutual Reinsurance Bureau* v. *Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933 (10th Cir. 1992).[1] This case is thus an entirely suitable vehicle to use in addressing the vitality of the *Pireno* factors in cases arising under the first clause of section 2(b).

Second, respondent argues that the conflict in the lower courts over the application of the *Pireno* factors is irrelevant here, because any case involving the enforceability of a term in an insurance agreement is *necessarily* one involving "the business of insurance." Opp. 3. That proposition is unprecedented, and was squarely rejected by the court in *Crawford*. Far from supporting the denial of the petition, respondent's resort to such a new and expansive proposition to defend the decision below underscores the need for this Court's review.

Respondent maintains that under *Fabe*, "consideration of the *Pireno* factors in a case concerning the actual performance of an insurance contract 'would be mere

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[1] *See also Smith* v. *PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal. App. 4th 139, 152-62 (2001), *cert. denied*, 537 U.S. 818 (2002); *Imbler* v. *PacifiCare of Cal., Inc.*, 103 Cal. App. 4th 567, 571-77 (2002); *Continental Ins. Co.* v. *Equity Residential Props. Trust*, 565 S.E.2d 603, 603-05 (Ga. Ct. App. 2002); *Cox* v. *Woodmen of the World Ins. Co.*, 556 S.E.2d 397, 399-402 (S.C. Ct. App. 2001).

formalism,' since all three prongs of *Pireno* are satisfied when the issue concerns the performance or enforcement of the insurance contract." Opp. 5. But in *Fabe*, the Court was acknowledging only that the business of insurance is implicated when there is a failure altogether to perform an insurance contract, because that would prevent the transfer of risk between insurer and insured. *Fabe*, U.S. at 503-04.

By contrast, the enforceability of an arbitration provision does not affect whether claimants will recover on their claims, and hence does not affect the transfer of risk between insurer and insured. See Pet. 18-19. The enforcement of an arbitration provision also does not "regulate, constrain, set benefits, exclusions or limitations that [a]ffect the relationship between the insurer and the policyholders." Pet. App. 26a. The enforcement of an arbitration provision thus affects only the process and procedures by which a claimant seeks relief, *not* the actual performance of the agreement. It is akin to enforcement of a choice-of-law provision, integration clause, or other common term of a contract, the enforceability of which has no nexus to the business of insurance. See Pet. 19; Pet. App. 26a; *Crawford*, 757 So. 2d at 1130-36.

Respondent's proposed new test is thus vastly overbroad. If every state law that affects the enforcement of any provision in an insurance contract also "regulat[es] the business of insurance," then there would no longer be any difference between the "business of insurance" and the business of insurance *companies*. Cf. Opp. 6 n.3. Neither this Court in *Fabe*, nor any lower court, has yet reached that conclusion. Like the decision below, respondent's broad reading of the McCarran-Ferguson Act would also permit it to "swallow federal preemption," and hence does nothing to undercut the need for this Court's review. Pet. App. 28a.

Respondent has failed to rebut petitioners' showing that the factual context of this case is an appropriate one in which to resolve the question presented. Respondent also does not dispute that there is manifest confusion in the lower courts

over the standard for applying the first clause of section 2(b) and has advanced no meaningful distinction of the Alabama Supreme Court's decision in *Crawford*. Whether the McCarran-Ferguson Act grants courts free reign to enforce state anti-arbitration laws against insurers is an issue of national importance that this Court should now resolve.

CONCLUSION

For the forgoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 03-642

IN THE

Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., and COLORADO PERMANENTE MEDICAL GROUP, P.C.,

Petitioners,

v.

KAREN PACHECO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN ASSOCIATION OF HEALTH PLANS-HEALTH INSURANCE ASSOCIATION OF AMERICA AND THE COLORADO ASSOCIATION OF HEALTH PLANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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No. 03-642

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v.

KAREN PACHECO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the American Association of Health Plans—Health Insurance Association of America ("AAHP-HIAA") and the Colorado Health Care Association ("CAHP") respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief. Their letter of consent has been lodged with the Clerk of the Court. Respondent has declined to consent.

AAHP-HIAA is the national association for the private health insurer community. AAHP-HIAA's mission is to advance health care quality and affordability through leadership in the health care community, advocacy and the provision of services to its members. AAHP-HIAA's nearly

1,300 member companies provide health, long-term care, dental, disability, and supplemental coverage to more than 200 million Americans.

CAHP is a trade association of group health insurance carriers that offer health maintenance organization or preferred provider organization products in Colorado. Over 2.6 million Coloradans have their health coverage through a CAHP member health plan. Eleven health plans are members of CAHP. CAHP represents the managed care industry before the Colorado General Assembly, the Department of Regulatory Agencies and Division of Insurance, and other legislative and executive branch entities. CAHP works closely with other organizations and entities on health care public policy to ensure a competitive marketplace for affordable, quality health coverage for Colorado employers to offer their employees.

Amici file this brief because of their interest in preserving the ability of managed care organizations and their enrolled members to resolve disputes through the use of arbitration agreements enforceable under the Federal Arbitration Act ("FAA"). The managed care community has a vital interest in ensuring that arbitration agreements are enforced consistently with the federal policy embodied in the FAA. State laws impairing the use of contractual arbitration to resolve disputes would have a profound impact on the ability of the employee benefit plan community and the health care industry to control costs while working for quality health care. Creating a huge loophole to allow States to enforce anti-arbitration laws forbidden by the FAA will drive up the cost of health care coverage and will discourage employers from purchasing managed care or insurance products, or from otherwise providing health care coverage to their employees.

The Colorado Supreme Court's decision, in misapplying the McCarran-Ferguson Act to save a state statute prescribing typeface, font and positioning requirements for arbitration

agreements used by health care providers, establishes an unfortunate precedent that encourages the misuse of the McCarran-Ferguson Act to allow States to enforce anti-arbitration laws.

For the foregoing reasons, AAHP-HIAA and CAHP respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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December 1, 2003

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF THE AMERICAN ASSOCIATION OF HEALTH PLANS—HEALTH INSURANCE ASSOCIATION OF AMERICA AND THE COLORADO ASSOCIATION OF HEALTH PLANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

The interests of *amici curiae* are set forth in the motion accompanying this brief.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity other than *amici* contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

The *amici* incorporate the Statement of the Case in the Petition for Writ of Certiorari and summarize the portions of the Colorado Supreme Court's opinion (Pet. App. 1a-28a) that are relevant to their arguments.

Respondent Karen Pacheco's husband was a member of the Kaiser Foundation Health Plan of Colorado ("Health Plan"). The Health Plan contracted with a variety of health care providers who delivered services to Health Plan members such as Mr. Pacheco. Petitioner Colorado Permanente Medical Group, P.C. ("CPMG") was a health care provider under contract with the Health Plan. Petitioners Lawrence S. Allen, M.D., Michael K. Miller, M.D., and Timothy R. Collins, M.D., are physicians employed by CPMG who provided medical services to Mr. Pacheco.

Ms. Pacheco filed a wrongful death action against Petitioners, alleging that they were negligent in diagnosing and treating her husband. In response, Petitioners moved to compel arbitration pursuant to an arbitration clause in Mr. Pacheco's "Group Medical and Hospital Services Agreement" with the Health Plan.

In response, Ms. Pacheco asserted that the arbitration clause was invalid because it did not comply with provisions of the Colorado Health Care Availability Act ("HCAA"), Colo. Rev. Stat. § 13-64-403 (Pet. App. 51a-55a), specifying typeface, font and similar requirements for disclosing arbitration clauses in agreements between patients and their health care providers.

Petitioners asserted that the HCAA was preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2. The trial court granted Petitioners' motion to compel arbitration. In ordering arbitration, the trial court rejected Ms. Pacheco's contention that the McCarran-Ferguson Act saved the HCAA from being preempted by the FAA. Pet. App. 46a-47a.

The arbitrator ruled in favor of Petitioners. Pet. App. 35a-44a. The trial court denied Ms. Pacheco's motion to vacate the arbitration decision. Ms. Pacheco then appealed. Pet. App. 34a. The Colorado Court of Appeals reversed, on grounds unrelated to the issues here. Pet. App. 29a-33a.

On review, the Colorado Supreme Court held that the HCAA's arbitration disclosure requirements were in conflict with the FAA. Pet. App. 12a. The Colorado court recognized that the FAA would preempt the HCAA, unless the HCAA was saved by the "reverse preemption" of the McCarran-Ferguson Act. The court then addressed whether the HCAA was enacted "for the purpose of regulating the business of insurance" so as to be saved by the McCarran-Ferguson Act. Pet. App. 13a.

The Colorado Supreme Court concluded that state laws are enacted for the purpose of regulating the business of insurance if they: (1) "directly regulate contracts between insurance policy holders and their insurers," and (2) "further the interests of these policyholders." Pet. App. 15a-16a. Applying this standard, the Colorado court found that the HCAA "regulat[es] health insurance contracts drafted by the health care provider." Further, the court found that the HCAA's typeface, font and similar standards for disclosing arbitration clauses used by health care providers "protect[s] patients who are insured by that provider." Pet. App. 16a & n.9. Based on these findings, the Colorado Supreme Court held that the HCAA was enacted for the purpose of regulating the business of insurance and, therefore, was saved from FAA preemption by the McCarran-Ferguson Act.

REASONS FOR GRANTING THE PETITION

Many managed care organizations have utilized contractual arbitration to resolve disputes more expeditiously, cost-effectively and amicably than through expensive and lengthy court litigation. The HCAA is one of many statutory efforts

at the state level to restrict the use of arbitration agreements. The HCAA in particular restricts the use of arbitration agreements in resolving medical malpractice disputes, by, among other things, prescribing typeface, font and other standards for disclosing arbitration clauses in contracts between health care providers and their patients.

The Colorado court's decision is a dangerous precedent that undercuts not only the federal policy under the FAA of promoting arbitration, but also the ability of Congress to determine when uniform federal standards ought to apply to transactions that may incidentally involve insurance or an insurer. If the Colorado court correctly held that a requirement regarding typeface, for example, can constitute the regulation of the business of insurance and invalidate an arbitration agreement, then virtually any state law regulating transactions touching insurance, however tangentially, would constitute the "business of insurance" and would preempt federal law pursuant to the McCarran-Ferguson Act.

Some states have adopted different requirements for the disclosure of arbitration agreements relating to medical malpractice disputes. Still other states outright prohibit the use of arbitration agreements for such disputes. The Colorado Supreme Court's decision encourages this variety of conflicting state standards by misinterpreting the McCarran-Ferguson Act and saving the HCAA from FAA preemption.

In this particular case, the McCarran-Ferguson Act was misapplied to save a state statute that restricts the use of arbitration as a method for resolving medical malpractice disputes. The HCAA, together with comparable statutes in other states, comprise a diverse and conflicting patchwork of state regulations restricting the use of arbitration. These state laws should not displace the federal policy favoring the enforcement of arbitration agreements consistent with the FAA.

I. THE COURT SHOULD GRANT THE PETITION TO UPHOLD THE FEDERAL POLICY OF ENCOURAGING ARBITRATION

As this Court has emphasized, the arbitration process is generally more expeditious and less expensive than litigation. These features of arbitration benefit everyone participating in our health care system, especially health care consumers.

> We agree that Congress, when enacting [the FAA], *had the needs of consumers, as well as others, in mind.* [emphasis added] *See* S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big business and little business alike, . . . corporate interests [and] individuals"). Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. *See e.g.*, H.R. Rep.-No. 97-542, p. 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . .")

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 280 (1995).

Consumers benefit because arbitration resolves disputes more expeditiously and inexpensively than litigation.[2] Arbi-

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[2] A study of the costs and benefits of arbitrating versus litigating employment-related claims strongly supports the use of arbitration for dispute resolution. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (Fall 1998). In one survey by the American Arbitration Association, claimants won 63% of the time in arbitration, compared with 14.9% in litigation. *Id.* at 46. The mean damages awarded in arbitration were $49,030, compared with $530,611 for litigation. *Id.* at 48. Yet through arbitration claimants

tration involves less formal procedures and less delay, which results in lower attorneys' fees for all parties. Moreover, arbitration involves an objective decision-maker less likely than a jury to be swayed by irrelevant, inflammatory evidence.[3] This feature of arbitration promotes damage awards that are commensurate with the nature of the injury sustained.[4]

The lower cost associated with the arbitration of disputes results in savings which can be passed along to consumers and employers. Conversely, the higher costs associated with court litigation, including the economic burden of excessive jury verdicts, are passed on from managed care organizations to individuals and employer groups and in some cases may dissuade employers from purchasing managed care or insurance products for the benefit of their employees. Thus, the ability of managed care organizations to resolve disputes through arbitration has a profound impact on the affordability and availability of health care services.[5]

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obtained 18% of the amount demanded, compared with 10.4% obtained through litigation. *Id.*

[3] One commentator has noted the expertise of neutral arbitrators as a primary benefit of arbitration. *See* Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 Wake Forest L. Rev. 203, 208 (Spring 1996). Medical malpractice disputes litigated in court may involve highly paid, partisan experts who are not motivated to make objective medical findings, and in some cases unqualified experts are used. *See id.* at 209.

[4] Jury verdicts in medical malpractice cases are especially prone to being excessive because these cases often involve claims of pain and suffering, which are subjective in nature and difficult to quantify. *See* Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 Wake Forest L. Rev. 203, 206 (Spring 1996).

[5] As noted by the National Arbitration Forum, "[t]he ripple effects are felt throughout the system and throughout the entire economy. Premium and legal costs are passed on to consumers, furthering patient dissatisfaction with America's healthcare system." *See Medical Justice*

In fact, several states, recognizing the benefits of arbitration rather than litigation for medical malpractice disputes, have enacted statutory arbitration programs. *See e.g.* Fla. Stat. § 766.207; Md. Code Cts. & Jud. Proc. § 3-2A-01 *et seq.*; Ohio Rev. Code § 2711.21; Vt. Stat. tit. 12 § 7001 *et seq.*; Va. Code § 8.01-581.12.

The managed care community has a substantial interest in the federal policy of enforcing arbitration agreements consistent with the FAA. Managed care organizations rely on arbitration to resolve legal disputes. Jury trials to resolve such disputes may result in verdicts that are "neither reasonable nor proportionate" to the alleged harm. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1526 (2003). Thus, managed care organizations have compelling reasons to utilize arbitration agreements which are enforceable under the FAA.

II. THE COURT SHOULD GRANT THE PETITION TO RESTORE PRINCIPLES OF FEDERALISM IMPACTING THE ENFORCEMENT OF ARBITRATION AGREEMENTS

The Colorado court's decision is an attempt at the state level to circumvent the important federal policies embodied in the FAA. The court has effectively granted states *carte blanche* to restrict the use of arbitration by insurers, and set an unfortunate precedent that conflicts with federal policy. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), where this Court held preempted a state law that was

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Through Alternative Dispute Resolution: Rational Alternatives to Lawsuits for Resolving Healthcare Disputes, available online at www.arbforum.com/articles/whitepapers/hc903.pdf (last visited Nov. 25, 2003). Furthermore, the rising cost of health care coverage threatens to exacerbate the crisis posed by the rising number of individuals without any health coverage—now estimated to total 40 million Americans. *Id.*

less restrictive than the Colorado law at issue here. Thus, this Court's review is necessary to vindicate important federal interests.

The Colorado court's reliance on the McCarran-Ferguson Act to save the HCAA establishes a precedent that could result in inconsistent requirements among other types of state statutes which may tangentially affect insurers. *See Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037, 1045 (7th Cir. 1998) (rejecting claim that McCarran-Ferguson Act saved state law disclosure standards for premium finance agreements from federal preemption under Truth In Lending Act). Many managed care organizations operate in multiple states[6] and, therefore, could be subject to multiple and inconsistent state law standards for using arbitration agreements and for disclosing them to members.

Arbitration disclosure requirements in other state statutes differ substantially from those set forth in the HCAA. For example, California law requires, *inter alia*, that health care providers give the following notice to patients in at least ten-point bold *red* type:

> NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

Cal. Civ. Proc. Code § 1295(b). Other states' statutes impose differing arbitration disclosure standards. *See e.g.* 710 Ill. Comp. Stat. § 15/9(d); La. Rev. Stat. § 4235; N.Y. Public

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[6] According to one report, InterStudy's *Competitive Edge Part II: HMO Industry Report*, as of January 1, 2003, 49% of health maintenance organizations ("HMOs") were owned by companies with HMO plans in multiple states, and 58.4% of those enrolled in HMOs were enrolled in "national" managed care firms.

Health Law § 4406-a; Ohio Rev. Code § 2711.24; S.D. Codified Laws § 21-25B-3; Tex. Civ. Prac. & Rem. Code § 171.002.

A few states totally prohibit the use of arbitration for medical malpractice disputes unless the agreement to arbitrate was formed after the alleged malpractice arose. *See* Ala. Code § 6-5-485(a); Ga. Code § 9-9-62. Other states flatly prohibit the use of arbitration agreements to resolve medical malpractice disputes. *See* Ark. Code § 16-108-201(b)(2); S.C. Code § 15-48-10(b)(4).

A patchwork regulatory environment would create substantial administrative burdens and additional costs for the managed care community seeking to comply with diverse arbitration standards nationwide. This defeats the intended purpose of the FAA to promote a uniform federal policy that places arbitration agreements on an equal footing with all other contracts. *See Allied-Bruce*, 513 U.S. at 281.

Further, the flaw in the lower court's analysis is demonstrated by the uneven enforcement of arbitration clauses that would result under the court's application of the McCarran-Ferguson Act to the HCAA. In some medical malpractice cases, physicians and health plans are alleged to be joint tortfeasors responsible for a single instance of medical malpractice, often with the health plan cited as being vicariously liable only. If the Colorado court's decision is upheld, an arbitration agreement could be enforceable or unenforceable depending on the "status" of the health care provider.

Thus, with regard to an arbitration clause violating the HCAA that was utilized by an "insurance-related" health care provider, the HCAA would be saved from FAA preemption by the McCarran-Ferguson Act and the arbitration clause would be declared unenforceable. However, with regard to the same arbitration clause used by "non-insurance" health care providers, the HCAA would be preempted by the FAA

and the arbitration clause would be enforced. Such a dichotomy would force claimants with medical malpractice disputes against both a physician and a health plan, arising out of the same occurrence, to arbitrate their claims against physicians and to litigate their claims against health plans in court. The uneven enforcement of arbitration agreements does not benefit either health plans or patients, and would be contrary to the intent of the statute. The HCAA was intended to apply evenly to the arbitration of medical malpractice disputes regardless of the "identity" of the health care provider. *See Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218, 1226-27 (Colo. 1996).

Moreover, the fact that the HCAA may incidentally apply to insurers because they are deemed to be included in the HCAA's definition of a "health care provider" does not mean that the statute regulates the business of insurance. *See Autry*, 144 F.3d at 1044-45 (declining to apply McCarran-Ferguson Act where state law "may serve to protect someone who happens to be an 'insured,' but it does not protect that person in his capacity as a party to a contract of insurance"). The lower court's decision misinterprets the McCarran-Ferguson Act and encourages the misapplication of the McCarran-Ferguson Act to undermine an important federal policy of enforcing arbitration agreements consistent with the FAA.

The implications of the Colorado court's decision for arbitration in general are serious. If a state law which prescribes typeface and similar disclosure requirements for arbitration agreements covering medical malpractice disputes were deemed to regulate the business of insurance, then state laws which outright prohibit the use of arbitration for medical malpractice disputes also could be deemed to regulate the business of insurance. Indeed, under the rationale of the decision, *any* state law having an incidental impact on an insurer would be saved from federal preemption by the

McCarran-Ferguson Act. Therefore, the lower court's decision has significant implications for fundamental principles of federalism.

State laws imposing disclosure requirements for arbitration clauses are preempted by the FAA. *Doctor's Associates*, 517 U.S. at 687. The FAA preempts any state law, such as the HCAA, which places arbitration agreements on "unequal footing" with any other type of agreement. *Allied-Bruce*, 513 U.S. at 281. Thus, this Court's review of the lower court's decision is necessary to protect the federal policies underlying the FAA.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 03-642

In the Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.

Petitioners,

v.

KAREN PACHECO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

AMICI CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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MOTION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

Petitioners have consented to the filing of an amici curiae brief by the Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CCC), but respondent refused to consent to its filing. Accordingly, CJAC and the CCC hereby move, pursuant to Supreme Court Rule 37.2(b), for leave to file a brief amici curiae in support of petitioners Lawrence S. Allen, M.D., et. al., in their Petition for a Writ of Certiorari.

The brief immediately follows this motion.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici – the Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CCC) – are vitally interested in the issue presented by this case—*viz.*, whether a state can, as Colorado has done here, prohibit or impede the ability of health plans and their members to enter into agreements to submit future disputes between them to binding arbitration.

The answer to this question turns on another: whether state restrictions on arbitration have to do with "the business of regulating insurance" or with something else. If they involve something else, then the Federal Arbitration Act (FAA) preempts states from invalidating arbitration agreements on any grounds other than what would invalidate contracts generally. If the anti-arbitration statute was enacted to regulate the "business of insurance," however, then the "reverse preemption" of the McCarran-Ferguson Act trumps the FAA's preemptive protection for arbitration.

The petition for certiorari here seeks relief from the Colorado Supreme Court's decision that its statutory restriction on arbitration agreements between health plans and their members need *not* comply with the FAA because they concern the "regulation of insurance," a matter exempt from the FAA by the McCarran-Ferguson Act.

Unfortunately federal and state courts are all over the board on whether state restrictions on arbitration concern the "business of regulating insurance" and what, as a matter of

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[1] This brief was written in its entirety by the counsel for the amici listed and not at all by any of the parties or their counsel. Further, the CCC and CJAC made the only monetary contributions toward the preparation of this brief.

federal law, this means. There is no uniform test used or agreed upon by the federal circuit courts or state supreme courts; and the resultant crazy-quilt of conflicting decisions leaves health plans, legislatures and courts in a quandary over whether and to what extent arbitration can be used in lieu of court to resolve disputes.

Resolution of this issue is of tremendous importance to the public. Most people obtain their medical care through group plans, what are popularly known as health maintenance organizations or preferred provider organizations. Most of these plans are structured similarly to the Colorado health plan here (Pet.App. 36a), and require (as a condition of membership) acceptance of binding arbitration to resolve future differences between the plan or its health care providers and the plan's members.[2]

Arbitration is used by medical plans because it is less costly, more informal, and more expeditious than full-dressed court battle. Arbitration allows more dollars paid by plan members and their employers for health coverage to go to medical services instead of to the seemingly black-hole of conventional litigation.

CJAC is a nonprofit organization of businesses, professional associations and local governments. Its principal purpose is to educate the public about changes in California's

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[2] As noted in Petitioners' brief, Respondent's husband received medical services from Petitioner Colorado Permanente Medical Group ("Medical Group"), through his health coverage with Kaiser Foundation Health Plan of Colorado ("Health Plan"). Health Plan operates principally as a group practice prepaid health plan and contracts for medical services exclusively with Medical Group. The contract for health coverage between Respondent's husband and Health Plan included the provision requiring arbitration of malpractice claims.

civil liability laws that will promote fairness, economy and efficiency. Arbitration is a form of alternative dispute resolution that CJAC's members favor because it is equally fair to the parties but more economical and expeditious than court litigation.

The CCC is the largest broad-based employer representative in California. Its membership represents one-quarter of the private sector jobs in California and includes firms of all sizes and companies from every industry throughout the state. Many of the Chamber's members are employers who provide medical coverage for their employees through health plans. These plans, much like the health plan in this case, condition enrollment by members on their acceptance of binding arbitration to resolve future disputes.

Amici have consistently opposed, so far successfully, attempts in the past two California legislative sessions to enact laws similar to Colorado's that would bar health plans and their members from agreeing, as a condition of joining the plans, to resolve future disputes between them by binding arbitration.[3] We believe that if the Colorado Court's opinion is allowed to stand, it will fuel new attempts in state legislatures and courts to eviscerate mandatory pre-dispute arbitration agreements in a variety of contexts.

The consequence of end-runs around the FAA's preemptive protection of arbitration on the pretext that state anti-arbitration statutes are regulations of insurance entitled to "reverse preemption" by McCarran-Ferguson will be severe: greater costs for goods and services, decreased access to health care for

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[3] See, e.g., SB 458 (2001) and AB 1751(2000), both of which would have barred a health care service plan application or contract from containing a provision requiring enrollees or subscribers to submit to binding arbitration to resolve disputes under the contract.

those most in need of it, and the demise of arbitration contrary to the public interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

Is arbitration "to be, or not to be? That is the question."[4] According to opinions by the Court, it is not just "to be" but to blossom free of state encumbrances. "There are real benefits to the enforcement of arbitration provisions . . . Arbitration agreements allow parties to avoid the costs of litigation;" and end-runs around the FAA's pro-arbitration purposes undermine it by "breeding litigation from a statute that seeks to avoid it." (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001), citing and quoting from *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 275 (1995).) "In creating [through the FAA] a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." (*Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).)

At least since *Southland Corp. v. Keating, supra*, 465 U.S. 1 and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) it has been beyond cavil that the FAA requires enforcement of pre-dispute binding arbitration agreements, even when they are obtained *as a condition* of employment or the rendition of services. But hostility to arbitration, especially from the personal injury bar, finds expression in legislative bills and statutes that seek to prohibit or impose upon it unique requirements not present in other contractual settings.

Colorado's Health Care Availability Act is one of these anti-arbitration laws: it bars arbitration agreements between

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[4] Shakespeare, *Hamlet*, Act III, Scene 1.

patients and health care providers that have, as an essential condition to their formation, the provision of "medical malpractice insurance to such health care provider." (Colo. Rev. Stat. § 13-64-403; Pet. App. 51a.) It also imposes *notice* requirements regarding the size of typeface and specific language content unique to arbitration agreements between patients and health care providers. (*Id.*)

According to the proponents of these laws, they are necessary to ensure that arbitration agreements are "voluntary," a term used repeatedly in the Colorado statute. Their underlying assumption is that *pre-dispute* arbitration agreements, ones entered into as a condition of receiving services or employment, are not voluntary; only *post-dispute* arbitration agreements can be *truly* voluntary. While there is "a facile appeal to this contention [it is] one that on further reflection dissolves from view. . . [P]ost-dispute arbitration agreements are almost never negotiated. It is a chimerical alternative to pre-dispute arbitration agreements." (Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 *OHIO ST. J. ON DISP. RESOL.* 559, __ (2001).)

The Colorado Supreme Court says the FAA's protective sweep for arbitration is *not* applicable to what that state has decided to do about arbitration agreements between patients and health care providers. Colorado statutorily spells out what "voluntary" means by stating what it *cannot* mean when it comes to these kinds of arbitration agreements. It *cannot* mean, says the statute, an agreement *conditioned* on the provision of medical malpractice insurance coverage between the plan and its health care providers. (Pet. App. 51a.) The FAA has, we are told, nothing to say about this restriction "because the McCarran-Ferguson Act . . . exempts [the Colorado statute] from federal preemption by the FAA." (Pet.App. 17a.) Colorado's high court is not alone in this view;

but can count in its corner the federal Fifth, Sixth and Tenth Circuit Court of Appeals.

A number of other courts, however, when faced with the same question reach the opposite conclusion. Along with the two dissenting justices in this case, the Alabama Supreme Court and the federal courts of appeal for the Second and Ninth Circuits have concluded that the McCarran-Ferguson Act does *not*, but the FAA *does*, apply to their states' arbitration statutes. They reach this conclusion because they also conclude that their state's statutes do not "regulate the business of insurance" but "medical malpractice actions" or something besides the business of insurance. (Pet. App. 26a.)

Whether various contractual arrangements between medical groups, individual physicians and health plans qualify as "the business of insurance" or are simply a means of delivering medical services by health care providers, or controlling "medical malpractice actions," or some hybrid of all these things is, of course, key to answering whether the FAA or the McCarran-Ferguson Act holds sway. It cannot, however, be answered by the mere act of "labeling," no more than calling a dog's tail a leg would bestow upon it five legs. No, the primary nature of the legal arrangement for which an arbitration agreement applies should be determined by a *uniform federal* standard, not by a state unilaterally saying something is "insurance" or trying to make it so by using the term "insurance" in its anti-arbitration statute.

When, as illustrated by this case, judicial opinions on the validity of state anti-arbitration laws reach starkly different conclusions based on the same *federal* statutory authority – something looks wrong. What's wrong is that the law is in a

state of "confusion worse confounded,"[5] a hodge-podge deserving of the Court's guidance so that clarity and uniformity inform the scope and application of intersecting federal statutes. This case presents the opportunity for the Court to provide that guidance.

ARGUMENT

I. THE DECISION OF THE COLORADO SUPREME COURT CONFLICTS WITH THOSE OF FEDERAL APPELLATE COURTS AND WITH THE HIGHEST COURT OF ANOTHER STATE CONCERNING THE SCOPE AND APPLICATION OF THE SAME FEDERAL STATUTES.

An established reason for the grant of certiorari is a direct conflict between the decision of a court of appeals and that of the highest court of a state where that conflict concerns a federal question. (See, *e.g.*, *Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *Andresen v. Maryland*, 427 US. 463 n. 5 (1976); *Lakeside v. Oregon*, 435 U.S. 333, 336 & n. 3 (1978).) Another strong reason favoring review is a conflict between the highest courts of two or more states on the application and sweep of the same federal statutes. (See, *e.g.*, *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n. 10 (1981); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 n. 1 (1985).) Both are present in this case.

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[5] John Milton, *PARADISE LOST, Book II, Line* 995.

A. The Opinion of Colorado's High Court Conflicts with Opinions of Federal Courts of Appeal on when the McCarran-Ferguson Act Negates the Preemptive Protection of the Federal Arbitration Act.

The Second and Ninth Circuits hold, contrary to the Colorado Supreme Court opinion here, that the McCarran-Ferguson Act does not preclude enforcement of the FAA to controversies involving insurers.

In *Hamilton Life Insurance Co. v. Republic National Life Insurance Co.*, 408 F.2d 606 (2d Cir. 1969), the court held that McCarran-Ferguson does *not* preclude the FAA's preemptive protection of arbitration agreements attendant to insurance unless such compliance conflicts with state laws regulating insurance. At issue was a written agreement which provided that Republic would reinsure a certain percentage of the risks on group life insurance policies written by Hamilton covering civil service employees in the New York City area. That reinsurance agreement contained a broad clause by which the parties promised that "[a]ll disputes and differences between the[m] . . . [would] be decided by arbitration . . .." Republic sought to avoid arbitration and instead resolve its differences in court, a position soundly rejected by the court on the ground that the statute did not "invalidate, impair or supersede applicable State legislation regulating the business of insurance." (*Id.* at 611.) Holding that New York's statute did not regulate the business of insurance, but instead "the method of handling contract disputes generally," the court refused to find the FAA reverse preempted by operation of New York and McCarran-Ferguson. (*Id.*)

Similarly, the Ninth Circuit, in *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992) held that Montana's insurance insolvency statute does *not* "regulate the

business of insurance" and preclude applicability of the FAA to a dispute between an insurer and reinsurer. (*Id.* at pp. 972-73.) The court rested its decision on its determination that the liquidator-plaintiff sought to enforce rights primarily derived from the insolvent insurer's *contract* rather than from Montana's insurance insolvency *regulation*. (*Id.* at 970.) The court held that because the underlying dispute between the parties was one of contract, and not one of insurance policyholders' rights, the parties were compelled to arbitrate their dispute pursuant to the FAA. (*Id.* at 972.) *Bennett* found no harm to the liquidator from the provision for an alternative dispute resolution forum. (*Id.* at 973.)

The correctness of the holdings in *Hamilton* and *Bennett* was underscored four years later by *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), which held that the FAA preempted a Montana statute that, like Colorado's here, required arbitration agreements to contain a special notice to those who entered into them. In striking down Montana's statute the Court stated that the FAA precludes "States from singling out arbitration provisions for suspect status, requiring instead that such provisions *be placed 'upon the same footing as other contracts*.'" (517 U.S. at 687; emphasis added.)

A year later the Tenth Circuit ruled the opposite in *Davister Corp. v. United Public Life Insurance Co.*, 152 F.3d 1277 (10th Cir. 1998), holding that the McCarran-Ferguson Act exempts a state court's blanket stay order in an insurance liquidation setting from FAA preemption because the stay "manifests a purpose of protecting policyholders." (*Id.* at 1281; accord: *Mutual Reinsurance Bureau v. Great Plains Mut.* 969 F.2d 931 (10th Cir. 1992), cert. den. 506 U.S. 1001 (1992).)

The Fifth and Sixth Circuits join with the Tenth in finding that state statutes regulating liquidation and prohibiting arbitration in such proceedings are protected by McCarran-

Ferguson from federal preemption of the FAA. The Fifth Circuit in *Munich Reinsurance Co. v. Crawford*, 141 F.3d 585, 587 (5th Cir. 1998) imposed a *per se* rule of reverse preemption denying the enforceability of any arbitration agreement in insurance insolvency proceedings. (*Id.* at 595-96.)

The Sixth Circuit, in *Fabe v. United States Department of Treasury*, 939 F.2d 341 (6th Cir. 1991), held that Ohio's comprehensive insurance liquidation statute "protected the interests of the insured" and "regulated the 'business of insurance,'" and was thus protected from federal preemption. (*Id.* at pp. 350-51.) Accepting certiorari in *Fabe*, the Court declined to define the relationship between the McCarran-Ferguson Act and the FAA, but reversed the Sixth Circuit's decision because "to the extent that [the Ohio priority statute involved] is designed to further the interests of other creditors . . . it is *not* a law enacted for the purpose of regulating the business of insurance." (*United States v. Fabe*, 508 U.S. 491, 508 (1993); emphasis added.)

In sum, there is a split between the federal circuits (the second and ninth, on one side, and the fifth, sixth and tenth, on the other) over whether the FAA applies to insurance contracts and what constitutes, as a matter of law, a regulation of "the business of insurance." Now is a good time for this Court to resolve the split by providing clear guidance.

B. The Opinion of the Colorado Supreme Court Clashes Directly with the Opinion of the Alabama Supreme Court on the Application of the Same Two Federal Statutes and How to Determine which Controls when they Clash.

American Bankers Insurance Co. of Florida v. Crawford, 757 So.2d 1125 (Ala. 1999) holds that Alabama's statute, providing that an agreement to submit to arbitration could not be specifically enforced, does not "reverse-preempt" the FAA

under McCarran-Ferguson even though it was incorporated by reference in that state's insurance code.

Crawford relied on Alabama's anti-arbitration law in seeking to avoid submission of his claim against his mortgage insurer to arbitration. In rejecting Crawford's contention that the FAA did not apply because of the reverse preemption of McCarran-Ferguson, the Alabama high court employed the analytical framework established in *United States Department of Treasury v. Fabe*, *supra*, 508 U.S. 491.

Fabe holds that reverse-preemption occurs under McCarran-Ferguson if: "(1) the federal statute at issue does not specifically relate to the business of insurance; (2) the state statute was enacted for the purpose of regulating the business of insurance; and (3) application of the federal statute invalidates, impairs, or supersedes the state statute." (*Id.* at 500-01.) "For reverse preemption to occur," the *American Bankers*' opinion said, "*each* of these three [*Fabe*] factors must be present." (*American Bankers*, *supra*, 757 So. 2d at 1131; emphasis added.)

In applying the *Fabe* factors, the Alabama Court concluded that the first factor was met because the FAA did not specifically relate to insurance. (*Id.* at pp. 1131-1132.) In analyzing the second factor – i.e., was the statute enacted for the purpose of "regulating the business of insurance?" – the court recognized that *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982) established three guidelines for determining this question.

> First, whether the [state statute] has the effect of transferring or spreading a policyholder's risk; second, whether the [statute] is an integral part of the policy relationship between the insurer and the insured; and third, whether the

> [effects of the statute are] limited to entities within the insurance industry.

(*Pireno*, *supra*, 458 U.S. at 129.)

The Alabama Court applied the *Pireno* test and concluded that its anti-arbitration statute was not "enacted for the purpose of regulating the business of insurance" because it did not have the effect of "transferring or spreading a policyholder's risk." (*American Bankers*, *supra*, 757 So. 2d at 1133.) A California appellate court made the same determination with respect to arbitration agreements in the context of the health plans and their members[6], but despite this conclusion decided contrary to Alabama that compliance with this prong of *Pireno* was not necessary for reverse-preemption under McCarran-Ferguson.

Colorado's high court and California's intermediate appellate court, however, resort to different tests under *federal* law from Alabama for determining whether an anti-arbitration statute was enacted "for the purpose of regulating the business of insurance." Colorado and California say, contrary to *American Bankers*, that *not* all three *Pireno* factors must be met before a state arbitration law can be characterized as regulating the "business of insurance." (Pet. App. 14a, n. 8.)[7] Indeed, the Colorado Supreme Court goes even further and says that in making this determination the court need "not specifically rely on the *Pireno* . . . factors . . . ." (*Id.*) Instead the Colorado Court relies principally on language it parses from *SEC v.*

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[6] "It is true that [California's arbitration statute for HMOs] does not transfer risk." (*Smith v. PacifiCare Behavior Health of Cal., Inc.*, 93 Cal.App.4th 139, 161 (2002), *cert. denied*, 537 U.S. 818 (2002) ("*PacifiCare*").)

[7] "[T]he so-called *Pireno* factors are merely 'consideration' to be weighed rather than essential criteria . . .." (*PacifiCare*, *supra*, 93 Cal.App.4th at 154 n. 18.)

National Securities, Inc., 393 U.S. 453 (1969), which "focuses on the relationship between the insurance company and the policyholder." According to the Colorado Supreme Court, any state statute "aimed at protecting or regulating this relationship, either directly or indirectly, is a law regulating the business of insurance." (Pet. App. 14a.)

Now, it doesn't take a soothsayer to see that many measures may well qualify as "indirectly" aimed at "protecting or regulating insurance." This capacious language sweeps within its ambit numerous arrangements that would not pass the commonsense test of what constitutes the "business of regulating insurance." As the dissenting opinion in the Colorado Supreme Court remarks, "[L]egislation requiring drivers to wear seat belts or motorcycle riders to wear helmets would be aimed at the business of regulating insurance because it could have an effect on insurance premiums." (Pet.App. 28a.) Perhaps sensing the disconnect between its own verbal formulae and reality, the Colorado Supreme Court sought to paper over the dilemma by asserting in a footnote that "the relationship between an HMO 'medical service provider' and 'patient' is the relationship between a 'medical insurer' and 'insured.'" (Pet. App. 16a n. 9.)[8]

But the determination of whether a statute impairing agreements to arbitrate "regulates the business of insurance" should not be made *ipse dixit*. A state restriction on arbitration agreements requires critical analysis to see if it comports with a uniform federal standard for ascertaining whether it was

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[8] California takes the same tack: it labels rather than analyzes the relationship of health plans to members, referring to an uncodified declaration in a statute regulating health plans and stating that they "are engaged in the business of insurance . . . for purposes of the McCarran-Ferguson Act." (*PacificCare*, *supra*, 93 Cal.App.4th at 158.)

enacted to regulate "the business of insurance." That examination cannot occur when courts are all over the map as to whether the *Pireno* factors must be met at all and, if so, which or how many of them must be satisfied.

II. THE COURT SHOULD CLEAR UP THE CONFUSION REGARDING APPLICABILITY OF THE *PIRENO* FACTORS UNDER THE FIRST CLAUSE OF § 2(b) OF THE McCARRAN-FERGUSON ACT

The mists of confusion surrounding the issue in this case emanate from Court decisions about the proper standard to be applied under the *first* clause of § 2(b) of the McCarran-Ferguson Act; in particular, whether and to what extent the *Pireno* factors apply in cases involving the first (as distinguished from the second) clause of section 2(b).

Both clauses use the phrase "business of insurance," though the first clause enables state law to preempt federal law "for the purpose of regulating the business of insurance,"while the second clause exempts the "business of insurance" from federal antitrust law when state antitrust law applies. (Pet.App. 50a.) Courts, including this Court, have wrestled with the question of whether the phrase "business of insurance" has the same or different meanings in the two clauses, and whether and to what extent the judicial definitions of "business of insurance" under the antitrust clause guide or bind definitions under the preemption provisions of the first clause.

The first case to tackle the issue, *SEC v. National Sec., Inc.*, *supra*, 393 U.S. 453, arose under the preemption clause of section 2(b). There the Court gave a rather narrow definition of the "business of insurance" that focused on "the relationship between the insurance company and policyholder." (393 U.S. at 460):

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement, "these were the core of the 'business of insurance.'" But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

From 1969 until 1993 the Court did not address the first clause of section 2(b), but considered the meaning of the phrase "business of insurance" under the antitrust clause of that section. The principle decisions are *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Ins. Co. v. Pireno, supra*, 458 U.S. 119 (1982).

In *Royal Drug* the Court explained that the two clauses of section 2(b) had different *purposes* and therefore could have different *meanings*. The first clause's purpose is to preserve state regulation of insurance companies (440 U.S. at 218-19, n. 18), whereas the second clause's goal is to give insurance companies a *limited* exemption from antitrust laws. (*Id.*) Agreements that do not concern the underwriting or spreading of risk and do not directly affect the insured are *not* part of the "business of insurance." (*Id.* at 232-33.) In its analysis, *Royal Drug* cites *National Securities*, in effect narrowing the definition of "business of insurance" under both clauses.

Pireno, as we've seen, announced a three-prong test for determining whether the antitrust clause of the Act exempts a given practice from federal antitrust laws. (See discussion *ante,* at 13-14.) The Court said that no one factor is determinative, but courts should examine the practice in relation to *all three* criteria.

Next came *United States Dep't. of Treasury v. Fabe, supra*, 508 U.S. 491, where the Court again addressed how to apply the *Pireno* criteria in a section 2(b) preemption case. In *Fabe*, a sharply divided Court upheld an Ohio law ranking priorities in liquidation proceedings that conflicted with a federal law giving the federal government first priority to the extent that it protected insurance policy holders. Protection of policy holders was pursuant to a law enacted "for the purpose of regulating the business of insurance," but preferences to employees and other general creditors did *not* escape preemption because their connection to the ultimate aim of insurance was too tenuous. *Fabe* thus gave an expansive reading to the phrase "for the purpose of regulating the business of insurance," stating that its reference in the first clause "consists of laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance [and] . . . *necessarily encompasses more than just the 'business of insurance.'*" (508 U.S. at 505; emphasis added.) Further, *Fabe* states that the first clause is "not so narrowly circumscribed" as the second clause. (*Id.* at 504.)

Fabe provoked a vigorous dissent by Justice Kennedy, who argued that the phrase "business of insurance" should have the same meaning in the first and second clauses, that the *Pireno* criteria should be controlling, and that the Ohio statute at issue failed the *Pireno* test. The dissent predicted the confusion that would reign under the majority opinion. "States attempting to discern the scope of powers reserved for them under the McCarran-Ferguson Act will find it difficult . . . to reconcile our precedents in this area with the decision the Court reaches today." (508 U.S. at 512, dissenting opn. by Kennedy, J.)

Since *Fabe* federal courts continue to be all over the lot on the question of the applicability of the *Pireno* factors to preemption clause cases. Two circuit courts, like the Colorado Supreme Court in the instant case, hold that the *Pireno* test

does *not* apply in preemption clause cases. (*Doe v. Northwest Bank Minnesota,* 107 F.3d 1297, 1305-06 (8th Cir. 1977)(*Pireno* is "relevant only in cases involving a conflict between state law and federal antitrust law"); *Autry v. Northwest Premium Services, Inc.,* 144 F.3d 1037, 1044, n.5 (7th Cir. 1998)(the court "did not understand *Fabe* to require *Pireno* analysis in this situation."))

Other courts disagree. *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.,* 50 F.3d 1486 (9th Cir. 1995) opined that *Fabe* applied the *Pireno* test to a preemption clause case. (*Id.* at 1490, n. 2: "In *Fabe*, the Supreme Court actually applied the [*Pireno* test], emphasizing that the acts involved there affected the transfer or spreading of risk.") In *Ambrose v. Blue Cross & Blue Shield,* 891 F.Supp. 1153 (E.D. Va. 1995), *aff'd,* 95F.3d 41 (4th Cir. 1996), the district court said that "although the *Pireno* analysis was developed in cases addressing the second clause of Section 2(b), it is relevant to the first clause for the limited purpose of defining the business of insurance." (*Id.* at 1155.)

The Third Circuit in *Sabo v. Metropolitan Life Insur. Co.,* 137 F.3d 185, 189, n.2 (3d Cir. 1998) found the *Pireno* test useful in a preemption clause case to the extent that it "may" provide guidance in a more generalized analysis. The Eleventh Circuit in *Blackfeet National Bank v. Nelson,* 171 F.3d 1237, 1246, n. 3 (11th Cir. 1999) applied the *Pireno* test in a preemption clause case because: "We cannot imagine that the 'business of insurance' could have two different meanings in the same statutory section."

In sum, courts interpreting *Fabe* have held in preemption clause cases that the *Pireno* test does control, doesn't control, does provide guidance, doesn't provide guidance, is the beginning of analysis, and isn't the beginning of analysis. The record is clear that the decision of the Court in *Fabe* has not

succeeded in imposing order on the chaos under the first and second clauses of section 2(b).

Most recently *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. ___, 123 S. Ct. 1471 (2003) added a new, and for many, additionally confusing wrinkle on the meaning of the "business of insurance." *Kentucky Ass'n* discusses the issue in the context of the Employee Retirement Income Security Act of 1974 (ERISA), which preempts all state laws "insofar as they may now or hereafter relate to any employee benefit plan" (29 U.S.C. § 1144(a)), but saves state laws from preemption when they "*regulate insurance,* banking, or securities." (§ 1144(b)(2)(A).)

Earlier Court opinions applied the *Pireno* test to determine whether certain state laws fell within the preemption saving clause of ERISA. (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-49 (1987) and *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 742-743 (1985).) In fact, these cases were prominently cited by the dissent in *Fabe* for the proposition that the *Pireno* test was used in contexts other than the antitrust clause of section 2(b) of the McCarran-Ferguson Act. (508 U.S. at 516.)

Ultimately, the Court throws in the towel on applying the *Pireno* test in the ERISA context. "We believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and, as this case demonstrates, added little to the relevant analysis." (123 S. Ct. 1471, 1478.) "Today we make a clean break from the McCarran-Ferguson factors." (*Id.* at 1479.)

Along the way, the Court makes new distinctions that cause additional confusion about the scope of the McCarran-Ferguson Act. For instance, *Kentucky Association* mentions problems applying the *Pireno* test to "state law" rather than to "conduct."

(123 S. Ct. At 1478-79.) Noting that the preemption clause of § 2(b) also refers to state laws, the Colorado Supreme Court used this distinction to justify rejection of the *Pireno* test altogether. However, whereas *Kentucky Association* imposed a rigorous alternative test, the Colorado Supreme Court devised a test loose enough to swallow federal preemption. In other words, the rationale the Court used for rejecting the *Pireno* test in the ERISA context has added confusion to the question of the applicability of the *Pireno* test in preemption cases under section 2(b).

CONCLUSION

For all of the aforementioned reasons, as well as the reasons articulated by petitioners, certiorari should be granted so that the Court can fix what is broken.

Respectfully submitted,

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No. 03-642

IN THE
Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.,
Petitioners,

v.

KAREN PACHECO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF REINSURANCE ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.,
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v.

KAREN PACHECO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

MOTION OF REINSURANCE ASSOCIATION OF AMERICA FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

The Reinsurance Association of America hereby moves, pursuant to Rule 37 of this Court, for leave to file an *amicus curiae* brief in support of Petitioners. The motion is necessitated by Respondents' refusal to consent.

The Reinsurance Association of America ("RAA") is the leading association of reinsurers in the United States. A non-profit trade association incorporated in the District of Columbia, the RAA represents eighteen member companies which are either domestic U.S. companies or U.S. branches of foreign reinsurers authorized and licensed in at least one

state. Together, RAA member companies write approximately two thirds of all reinsurance assumed by U.S. property and casualty reinsurers.

The RAA has a long-standing interest in participating as amicus curiae in cases across the country that affect the reinsurance industry. For example, the RAA has filed briefs of amicus curiae on the issue of reinsurance arbitration in numerous cases including, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) and *Marathon Oil Co. v.Ruhrgas*, 145 F.3d 211 (5th Cir. 1998). The RAA has also addressed the issue of preemption and the McCarran-Ferguson Act specifically as amicus curiae before this Court in *Humana v. Forsyth*, 525 U.S. 299 (1999). In each case the RAA was able to offer a unique perspective to assist the court in its resolution of the issues presented.

As stated in the accompanying brief, the resolution of this case is of great significance to not only the RAA and its members, but to the entire insurance industry. This Court's interpretation of the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.* (1994), and in particular, the scope and meaning of the phrase "for the purpose of regulating the business of insurance," will help resolve a currently uncertain and divisive state of the law in the lower courts. Because the application of the Federal Arbitration Act to the RAA's members will often turn on the interplay of state statutes and the McCarran-Ferguson Act, the Court's interpretation of, and standards for applying these acts here may very significantly define the scope of the RAA's members' permissible use of arbitration as a dispute resolution mechanism.

The Reinsurance Association of America believes its brief will provide the Court with relevant legal and factual information not already brought to the Court's attention by

the parties, particularly with respect to the broad significance of the question presented and a proper construction of the McCarran-Ferguson Act.

Based on the foregoing, the RAA respectfully requests this Court grant its Motion for Leave to File a Brief of *Amicus Curiae* in support of the Petitioners.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE

The RAA is a non-profit trade association incorporated in the District of Columbia, having its principal place of business in the District. The eighteen member companies who make up the RAA are principally engaged in the business of reinsuring property and casualty risks underwritten by primary insurance companies. These members are either domestic U.S. companies or U.S. branches of foreign reinsurers. Together, RAA member companies write approximately two thirds of all reinsurance assumed by U.S. property and casualty reinsurers. The RAA's principal purpose is to promote the interests of the property-casualty reinsurance industry and its members before Congress and state legislatures, federal and state regulatory authorities, courts and the general public. Members of the RAA act as reinsureds (or "cedents"), reinsurers and retrocessionaires in the insurance industry.

The resolution of this case is of great significance to the RAA and its members. This Court's interpretation of the McCarran-Ferguson Act of 1945, and in particular, its interaction with the Federal Arbitration Act will help resolve the currently uncertain and divisive state of the law in the lower courts. Because the application of the Federal Arbitration Act to the RAA's members will often turn on the interplay of state statutes and the McCarran-Ferguson Act, the Court's interpretation of, and standards for applying these acts here may very significantly define the scope of the RAA's members' permissible use of arbitration as a dispute resolution mechanism.[1]

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[1] Respondents refused to provide consent to the filing of this brief. Accordingly, *amicus curiae* has submitted a motion for leave to file the brief. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its members made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The resolution of the question presented – whether a state law restricting the use of arbitration in agreements between patients and health care providers is "reverse preempted" by the McCarran-Ferguson Act – will have a tremendous impact on the insurance industry. Proper consideration must be given to such an important question in order to uphold the federal policy of encouraging arbitration. The Decision of the Colorado Supreme Court creates a perilous precedent that will harm this federal policy as well as the ability to determine, with a uniform standard, when the application of McCarran-Ferguson is appropriate in transactions only incidentally involving insurance. Allowing the overly broad interpretation of the Colorado Supreme Court on the question of whether state restrictions on arbitration concern "regulating the business of insurance" will further confuse the issue of arbitration in the insurance context and could lead to virtually any state law related to insurance, however tenuously, preempting federal law pursuant to the McCarran-Ferguson Act.

The RAA's members have a vital interest in the enforcement of their arbitration agreements. Because arbitration avoids the costliness and delays of litigation and permits the parties to take advantage of specialists familiar with insurance industry custom and usage, it is common for reinsurance contracts to provide that all disputes between the reinsurer and insurer must be resolved through arbitration.

ARGUMENT

I. GRANTING THE PETITION IS IMPORTANT BECAUSE OF THE NEED FOR THIS COURT TO UPHOLD THE FEDERAL POLICY OF ENCOURAGING ARBITRATION IN THE INSURANCE INDUSTRY

A. A BROAD VIEW OF THE FEDERAL ARBITRATION ACT IS IMPERATIVE TO CONGRESS' PURPOSE IN ENACTING THE LAW

The decision of the Colorado Supreme Court circumvents the important federal policies embodied in the FAA. Its broad application of the McCarran-Ferguson Act allows state laws to displace the federal policy favoring the enforcement of arbitration agreements embodied in the FAA.

The history of Congress' ardent support for arbitration is evident in the laws it has passed supporting alternative dispute resolution. This unbending favor for arbitration became distinct with the passage of the Federal Arbitration Act (the "FAA") in 1925[2], then with the United States' accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") and adoption of its implementing legislation in 1970. Specifically, in supporting the Convention, Congress indicated its intent to broadly support international arbitrations as swifter, more efficient ways to decide

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[2] The United States Arbitration Act, Pub. L. No. 25-401, 43 Stat. 883 (1925); 9 U.S.C. §§ 1-16 (2002). "Convention" in 9 U.S.C. § 205 refers to the Convention on the Recognition of Foreign Arbitral Awards, 3 U.S.T. 2517, T.I.A.S. No. 6957, 330 U.N.T.S. 38 [1970], reprinted following 9 U.S.C. § 201, and the term shall have the same meaning in this brief.

multinational commercial disputes.[3] Likewise, the legislative history indicates a strong Congressional support for the Convention and its reciprocal recognition of arbitration agreements and awards internationally and its belief that these tools are necessary for the United States to compete fully in the global economy.[4]

Historically, Congress has taken a broad view of arbitration laws. But, even before Congress recognized the benefits of arbitration over litigation, American courts "frequently criticized the rule [that arbitration was against public policy] and recognized its illogical nature and the injustice which result[ed] from it." H. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924). The 68th Congress did away with the presumption against enforcement of arbitration agreements by passing the Federal Arbitration Act in 1925. From that point on, Congress required American courts to recognize and enforce valid arbitration agreements. Congress viewed enactment of the FAA, in part, as crucial to the smooth operation of domestic commerce and as evidence of an appreciation for the value of producing relatively swift, economical dispute resolution. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924). Indeed the drafters of the FAA had also

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[3] *Meadows Indem. Co. v. Baccala & Shoop Ins. Servs., Inc.*, 760 F. Supp. 1036 (E.D.N.Y. 1991) (noting the Convention's purpose of encouraging enforcement of commercial arbitrations and the federal policy in favor of arbitral dispute resolution).

[4] As this Court has said, the federal policy favoring arbitration "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Island Territory of Curacao v. Solidtron Devices*, Inc., 356 F. Supp. 1 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

specifically considered consumer needs: "the Act, by avoiding the delay and expense of litigation, will appeal to big business and little business alike ... corporate interests [and] individuals." *Id.*

Congress provided in the Federal Arbitration Act (FAA) that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2002). In addition, the FAA expresses a strong national policy in support of arbitration, and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1983); *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453, 456 (5th Cir. 1998).

Faced with increasing international trade, Congress eventually moved to work with other nations to enforce worldwide the same arbitration principles behind the FAA. Thus, under the auspices of the United Nations, the United States negotiated the Convention on the Recognition of Foreign Arbitral Awards in May and June of 1958. Leonard V. Quigley, *Convention on Foreign Arbitral Awards* 58 A.B.A. J. 821 (1972).

Under the Convention, any signatory country is now required to enforce or recognize arbitral awards issued in the United States as valid and binding; all signatory countries must now use the same, summary enforcement procedures for arbitration agreements that are found in the Convention; businesses from signatory countries, including the U.S., have foreknowledge of procedures and certainty that external courts will enforce their arbitration agreements; and all these benefits result in the achievement of smoother dispute

resolution in international commerce, as businesses may have more confidence in planning their foreign transactions.

As explained by this Court, the goal of the Convention is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify standards by which agreements to arbitrate are observed . . . in signatory countries." *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528, 538 (1995) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974)). Courts may effectuate the goals of the Convention and Congress' long standing support of arbitration only through the broad enforcement of arbitration rights.

Ironically, the Convention was designed to bring the ideals embodied in the FAA to the international community, yet the application of the FAA to domestic disputes remains uncertain, as states continue to seek to limit its use, particularly in the insurance industry.

The FAA was enacted specifically to overcome a historic judicial hostility to the enforcement of private arbitration agreements. *Allied Bruce-Terminix Co. v. Dobson*, 513 U.S. 265, 270-71 (1995). The FAA's central and overriding mandate is that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with the rules applicable to other contractual terms. *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 474 (1989); 9 U.S.C. § 2. By virtue of its enactment, this Court has held that "state courts cannot apply state statutes that invalidate arbitration agreements." *Allied Bruce-Terminix*, 513 U.S. at 272. Yet, according to the Colorado Supreme Court, a state court may apply a state tort reform statute aimed at medical malpractice that invalidates arbitration agreements simply because of its tangential

relation to insurance. The Colorado Supreme Court's decision in this case directly undermines the "substantial federal concern for the enforcement of arbitration agreements," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 at 728-29 (1996), and as explained herein, contributes to a growing confusion among the lower courts over the scope and application of the McCarran-Ferguson Act.

Granting the petition in this case will allow the Court to again underscore the federal policy encouraging arbitration and its relation to state statutes which run counter to this policy.

B. THE INSURANCE INDUSTRY HAS HISTORICALLY RELIED ON THIS COURT'S BROAD VIEW OF THE APPLICABILITY OF THE FAA IN CHOOSING DISPUTE RESOLUTION MECHANISMS WHILE STRUCTURING ITS BUSINESS AGREEMENTS.

It has been said that "arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society." S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924). In fact, agreements to arbitrate disputes can be found as far back as the Roman Empire. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 Yale L. J. 595, 597 (1928). And arbitration as we know it in the United States today is rooted in these European sources.

A product of this history, arbitration has long been the dispute resolution mechanism of choice for the reinsurance industry, and historically, arbitration clauses have been included in reinsurance contracts. John S. Butler & Robert M. Merkin, *Reinsurance Law* (rev. ed. 1993)

C.5.1-01; R.L. Carter, *Reinsurance* 146 (1979). For example, written arbitration clauses can be found in continental European reinsurance agreements in the first half of the 19th century and earlier. K. Gerathewohl, et al, *Reinsurance Principles and Practice, Vol. I*, at 716 (1980). An 1895 reinsurance agreement involving Munich Reinsurance Company Limited of Munich contained a clause that read:

> In the event of any difference hereafter arising between the contracting parties with reference to any transaction under this treaty the same shall be referred to two Arbitrators . . . *RAA Manual for the Resolution of Reinsurance Disputes* 8 n.17 (1997).

Despite wide support today, courts have not always viewed arbitration agreements in a favorable light. Previously, some courts invalidated the arbitration clause as being contrary to public policy, though others went as far as to suggest that the entire contract might be unenforceable, since the arbitration clause evidenced the parties' lack of intent to create a legal relationship.[5] This attitude has changed, however, with the continued recognition of the value of arbitration and the increasingly international character of reinsurance. *Id.* The change in point of view by United States courts has been so extensive that this Court stopped an attempt by the California legislature to invalidate agreements to arbitrate claims under that State's Franchise

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[5] Linda Lasley, "So You Think You're Going to Arbitrate: Contract Wording and the Parties Expectations," *Journal of the Independent Reinsurance Underwriters' Assoc.*, 11-12; *See also*, Barry C. Silverman, *Voluntary Commercial Arbitration*, 25 J. Marshall L. Rev. 309, 313-317 (1992).

Investment Law. *Southerland Corp. v. Keating*, 465 U.S. 1 (1984). Insurance liquidators also are no longer immune from demands for arbitration. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

Parties to reinsurance contracts continue to utilize arbitration clauses because traditionally arbitration works to more efficiently resolve disputes. Moreover, as noted above, federal policy strongly favors arbitration.[6] This policy stems in part from the conclusion that arbitration is a "socially desirable instrumentality for the settlement of disputes outside the . . . beleaguered courts." *Sibley v. Tandy Corp.*, 547 F.2d 286, 287 (5th Cir. 1977).

Arbitration avoids the costliness and delays of litigation, and permits the parties to take advantage of specialists familiar with industry custom and usage.[7] This point is especially important when one considers the international aspects of reinsurance. Today, U.S. insurers cede reinsurance risks to more than 2,200 reinsurers in over

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6 *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Const. Co.*, 460 U.S. 1 (1983) ("[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements").

7 *Prudential Lines v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983). For example, compare the almost eight years of litigation the liquidator of the Union Indemnity Insurance Company had to go through before being able to start the collection process against creditors, e.g., *Michigan National Bank v. American Centennial Ins. Co.*, 521 N.Y.S.2d 617 (N.Y. Sup. Ct. 1987), with the four months it took Transit Insurance Company's liquidator to obtain a ruling and take an appeal in an arbitration with one of Transit's alien reinsurers. *Transit Casualty Co. v. Trenwick Reinsurance Co.*, 659 F.Supp. 1346 (S.D.N.Y. 1987).

95 jurisdictions outside the United States.[8] These reinsurers from outside the United States account for approximately 46% of all reinsurance in the United States. U.S. insurers heavily rely on the worldwide reinsurance market because U.S. reinsurers lack the necessary capacity to reinsure all the U.S. risk.[9] The reinsurance industry utilizes arbitration to avoid the expense and complexity of international litigation.

Because of the importance of arbitration to complex business arrangements present in the international insurance community as well as the need for the ability to confidently implement domestic arbitration agreements under U.S. law, the Court should grant the petition in order to clearly articulate the standard to be applied in determining reverse preemption as it results from application of the McCarran-Ferguson Act.

II. DETERMINING PREEMPTION UNDER THE FAA AND MCCARRAN-FERGUSON REQUIRES ONE CLEAR STANDARD

A. Resolution of this Case Will Determine the Scope of Preemption for an Entire Industry.

The issue of preemption and reverse preemption looms large in the insurance arena. Without clear direction from this Court, the conflicted state of the law will continue,

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[8] Reinsurance Association of America, *Alien Reinsurance in the U.S. Market* 2 (2003).

[9] William C. Marcoux, Alien Reinsurers, in *Reinsurance: Fundamentals and New Challenges* 142 (Ruth Gastel ed., Insurance Information Institute 1995).

causing confusion for both policyholders and insurers alike. An in-depth discussion of the conflicts and confusion that exist in the lower courts with regard to the standard to be applied in determining reverse preemption under the first clause of McCarran-Ferguson is presented in the Petition for a Writ of Certiorari. In addition to the arguments below, the RAA would like to draw the Court's attention to and support the arguments of the Petitioners on this issue.

The Colorado Supreme Court held that the arbitration restrictions found in a state statute, the Health Care Availability Act, Colo. Rev. Stat. § 13-64-403, ("HCAA"), conflicted with the FAA. Pet. App. 12a. Thus, unless the statute was otherwise saved from preemption, the FAA would control and bar the statute's enforcement.

The Respondent asserted, and the Colorado Supreme Court agreed, that the FAA was reverse-preempted by the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§1011-1015, so as to render the parties' arbitration agreement unenforceable. The McCarran-Ferguson Act is designed to clear the way for state laws regulating the business of insurance, by displacing federal laws that conflict with such state laws. But McCarran-Ferguson applies only in "the narrow range of cases involving state regulation of the insurance industry, [and] permits a state law to reverse preempt a federal statute only if: (1) the federal statute does not specifically relate to the "business of insurance;" (2) the state law was enacted for the "purpose of regulating the business of insurance;" and (3) the federal statute operates to "invalidate, impair, or supersede" the state law. *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998).

In determining whether the statue in question was enacted "for the purpose of regulating the business of

insurance," the Colorado Supreme Court focused on two U.S. Supreme Court decisions – *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969) and *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993). Combining the reasoning of these two cases, the Colorado Supreme Court found that the HCAA directly regulated health insurance contracts and furthered the interests of patients (who the court considered policyholders since it determined HMOs acted as health care insurers).

The Colorado Supreme Court's reasoning in finding reverse preemption is inoperably broad, overly simplistic, ignores the plain meaning of McCarran, and is at odds with the fundamental principles of federalism that underlie both McCarran and this Court's well-established jurisprudence regarding the relationship between state and federal law. More specifically, the Colorado Supreme Court's interpretation of the McCarran-Ferguson Act as covering any law that "furthers the interests of policyholders" is so broad as to effectively apply to any state law that affects insurance generally, but may have no significant connection to the business of insurance. Further, the Colorado Supreme Court's restrictive view of the protective elements of the FAA cannot be squared with either Congressional intent or this Court's prior interpretations of both McCarran and other statutes.

This Court has repeated " '[o]ver and over' " that " ' [i]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Regions Hosp.* v. *Shalala*, 118 S. Ct. 909, 917 n.5 (1998) (quoting *United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States* v. *Heirs of Boisdore*, 8 How. 113, 122, 12 L. Ed. 1009 (1849)). The object and policy of the Federal

Arbitration Act is to ensure the validity and enforcement of arbitration agreements. Congress made that purpose very clear at the time it enacted the FAA; by enacting section 2, Congress sought to place arbitration agreements "upon the same footing as other contracts where [they] belong. H. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

The new test developed by the Colorado Supreme Court – considering whether state laws "directly regulate contracts between health insurance policyholders and their insurers" and "further the interests of these policyholders" – is so broad as to completely swallow federal preemption under the first clause of section 2(b) of McCarran-Ferguson. Under such a standard, almost any state law of general applicability could be said to be "for the purpose of regulating the business of insurance." This interpretation would nearly eviscerate the policy embodied in the FAA and has no obvious relationship to the language of McCarran-Ferguson.

In addition, the HCAA bears resemblance to many other restrictive statutes whose scope is not limited to the insurance industry. However, unlike the Colorado Supreme Court, most other courts have not saved these statutes from FAA preemption under McCarran-Ferguson. *American Bankers Ins. Co. of Fla. v. Crawford*, 757 So.2d 1125 (Ala. 1999); *Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir. 1971); *Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606 (2nd Cir. 1969). This case is a particularly important one for this Court to use in resolving this conflict, because the Colorado Supreme Court's construction of McCarran-Ferguson's savings clause is so broad as to make federal preemption unavailable.

Because arbitration is of great importance to the insurance industry, the determination of preemption under

the FAA and reverse-preemption under McCarran-Ferguson will continue to complicate and confuse the use of arbitration until this Court clarifies the standards to be used in deciding whether state laws restricting the use of arbitration are enforceable against insurers.

B. THE COLORADO SUPREME COURT DECISION PROVIDES NO GUIDANCE IN APPLYING STANDARDS FOR DETERMINING QUESTIONS OF PREEMPTION.

As explained above, the Colorado Supreme Court devised a new test to determine what constitutes the "business of insurance" under McCarran-Ferguson. However, since this interpretation covers any law that "furthers the interests of policyholders," its application is so broad as to create no meaningful standard at all.

The Colorado Supreme Court's holding compounds the well-established and growing conflict among the lower courts over the applicability of this Court's decision in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) to cases arising under the first clause of the McCarran-Ferguson Act. In *Pireno*, an insurer utilized a peer review committee to resolve policyholder claims involving chiropractor services. Applying a now-familiar three-part test—which looks to whether the practice (i) "has the effect of transferring or spreading a policyholder's risk," (ii) is an integral part of the policy relationship," and (iii) "is limited to entities within the insurance industry"—this Court held that the claims review process was not part of the "business of insurance." *Id.* at 129. The Court emphasized that the "challenged peer review arrangement [wa]s logically and temporally unconnected to the transfer of risk accomplished by [the] insurance policies" *id.* at 130, and that the insurer's "use of the [peer review committee] as an aid to its decisionmaking process [wa]s a

matter of indifference to the policyholder, whose only concern is whether his claim is paid, not why it is paid," *id.* at 132.

Colorado's Health Care Availability Act, and in particular the provisions concerning enforceability of arbitration agreements between patients and health care providers, is similarly unconnected to the transfer of risk accomplished by insurance policies. The use of arbitration is also not "integral" to the policy relationship in a manner that is unique to the business of insurance; arbitration is a method of dispute resolution that is important to many business arrangements, but like other laws of general applicability, the availability of arbitration does not pertain to any of the aspects of insurance that distinguish a policy relationship from other commercial agreements. Further, as the trial court in this case addressed, the HCCA does not meet the third factor set out in *Pireno* since the statute is not limited to entities within the insurance industry.

The Colorado Supreme Court's refusal to consider the *Pireno* factors brings to light the continuing conflict in applying any one standard to preemption cases. Two circuits have held that the *Pireno* test does not apply in first clause preemption cases. *Doe v. Northwest Bank Minnesota*, 107 F.3d 1297 (8th Cir. 1977); *Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037 (7th Cir. 1998). Two other circuits have held that the *Pireno* test should apply. *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir. 1995); *Ambrose v. Blue Coss & Blue Shield*, 891 F.Supp. 1153 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996). Still two other circuits have said the *Pireno* test may apply. *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185 (3rd Cir. 1998); *Blackfeet National Bank v. Nelson*, 171 F.3d 1237 (11th Cir. 1999). The court in *Blackfeet* opined that the *Pireno* test applied in that case

because: "[w]e cannot imagine that the 'business of insurance' could have two different meanings in the same statutory section. *Id.* at 1246, n. 3.

The Court should grant the petition in this case in order to reconcile the varying decisions across the circuits and determine a uniform standard for applying the McCarran-Ferguson Act.

C. WITHOUT A CLEARLY ARTICULATED FEDERAL STANDARD FOR PREEMPTION, STATE COURTS WILL BE FREE TO IMPOSE ONEROUS RESTRICTIONS ON ARBITRATION

Determining whether the FAA or the McCarran-Ferguson Act controls in this case will help identify what constitutes the "business of insurance." In the case at bar, at issue are contractual arrangements between medical groups, individual physicians and health plans. In the future, countless situations involving contractually mandated arbitration could be envisioned.

In fact, the issue often arises in the context of insurance receiverships – also invoking the issue of McCarran-Ferguson reverse preemption. Receivers repeatedly seek to override reinsurance contract arbitration clauses by claiming that state receivership courts have exlcusive jurisdiction over all receivership matters. However, reinsurers have consistently objected to the idea of exclusive jurisdiction of receivership courts and typically seek to remove suits against them to federal district courts, requesting that the federal courts compel the receiver to

arbitrate pursuant to the terms of the reinsurance agreement. The trend of recent decisions clearly favors reinsurers.[10]

Especially significant is this Court's decision in *Quackenbush*. In the Mission Insurance insolvency, the liquidator – the California Insurance Department – sued Allstate and others in the liquidation court for reinsurance recoverables. Allstate removed to federal district court and moved for resolution of the dispute by arbitration. When the Supreme Court finally ruled after various appeals, the decision favored reinsurers by ensuring the right of access to federal courts for the resolution of contract disputes and by reaffirming the ability to arbitrate disputes according to reinsurance agreements.

In cases brought by receivers against reinsurers, as debtors, reinsurers have uniformly been successful in enforcing their contractual arbitration rights. State and federal courts have compelled arbitration against receivers in

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[10] *See, e.g., Quackenbush v. Allstate*, 517 U.S. 706 (1996); *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996); *Grode v. Mutual Fire*, 8 F.3d 953 (3rd Cir. 1993); *Costle v. Fremont Indemnity Co.*, 839 F.Supp. 265 (D. Vt. 1993) (liquidator stands in insolvent company's shoes, and absent state law or liquidation order requiring proceeding in "judicial forum", FAA requires dispute to be resolved in arbitration in accordance with contract); *Ainsworth v. Allstate Ins. Co.*, 634 F.Supp. 52 (W.D. Mo. 1985) ("Where the arbitration clause is contained in a contract involving interstate commerce... it is enforceable under the FAA regardless of any state laws to the contrary.") *See also, Fabe v. Columbus Ins. Co.*, 587 N.E.2d 966 (Ohio Ct. App. 1990); *Selcke v. New England Ins. Co.*, 995 F.2d 688 (7th Cir. 1993); *Schacht v. Beacon Ins. Co*, 742 F.2d 386 (7th Cir. 1984); *Phillips v. Lincoln National Health & Cas. Ins. Co.*, 774 F.Supp. 1297 (D.Colo. 1991); *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992); *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998).

New York (*Bernstein (as Receiver for Ambassador) and Corcoran (as Rehabilitator of Horizon) v. Centaur*, 606 F.Supp. 98 (S.D.N.Y. 1984); *Corcoran (as Liquidator of Union Indemnity) v. AIG Multi-Line Syndicate, Inc., et al.*, 539 N.Y.S.2d 630 (N.Y. Sup. Ct. 1989)), Missouri (*Ainsworth v. Allstate,* 634 F.Supp. 52 (W.D.Mo. 1985)), Ohio (*Fabe v. Columbus*, 68 Ohio App.3d 226 (Ct. App. Ohio 1990)), Colorado (*Phillips (as Receiver of Healthcare United) v. Lincoln National*, 774 F.Supp. 1297 (D. Colo. 1991)), Pennsylvania (*Foster (as Rehabilitator of Mutual Fire) v. Philadelphia Manufacturers*, 592 A.2d 131 (Pa. Commw. Ct. 1990). *Reconsideration denied* (1991)), Illinois (*Schact (as Rehabilitator of Centaur) v. Hartford Fire*, 1991 WL 171377 (N.D. Ill. 1991)), California (*Garamendi v. Caldwell*, 1992 WL 203827 (C.D. Cal. 1992)) Texas (*Everest Reinsurance Company v. Howard*, 950 S.W.2d 800 (Tex. App. 1997)) and Vermont (*Costle (as Liquidator of Ambassador) v. Fremont Indemnity Co.*, 839 F.Supp. 265 (D. Vt. 1993)). Additionally, U.S. Courts of Appeal have compelled arbitration in the Third, Seventh and Tenth Circuits.[11] Finally, this Court has found that federal courts should not abstain from hearing actions brought by receivers to simply collect potential assets, like reinsurance. In *Quackenbush* this Court found that such actions do not interfere with comprehensive state regulatory schemes. In making such findings the Court has undercut the thrust of receivers' primary objections to arbitration and paved the way for future courts to continue the trend of what has

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[11] *Schacht v. Beacon*, 742 F.2d 386 (7th Cir. 1984); *Selcke (as Rehabilitator of Centaur) v. New England Insurance Co.*, 995 F.2d 688 (7th Cir. 1993); *Grode v. Mutual Fire (in Rehabilitation) v. Brittany Insurance Co.*, 8 F.3d 953 (7th Cir. 1993); *Bennett (as Liquidator of Glacier General) v. Liberty National*, 968 F.2d 969 (9th Cir. 1992); *Quackenbush (as Liquidator of Mission) v. Allstate*, 121 F.3d 1372 (9th Cir. 1997).

already become the clear majority view. Notwithstanding this trend and this Court's ruling in *Quackenbush*, some states, like New York, continue to question the enforceability of arbitration agreements. [12]

Nevertheless, despite this progress, the standards governing use of arbitration in the insurance industry, and the enforceability of state laws that restrict its use, remain uncertain. The Colorado Supreme Court decision adds to this uncertainty and is inconsistent with prior precedent of this Court. Lacking a clear standard for determining reverse preemption under McCarran-Ferguson, states continue to attempt to erode the enforceability of arbitration agreements, as receivers have attempted to do, unsuccessfully in the context of insurance receiverships. This Court should end the confusion by addressing dispositively the question presented here of whether state laws that restrict the use of arbitration are laws that regulate the business of insurance, as the court below held, or instead are merely laws that regulate dispute resolution with no particular nexus to the business of insurance, as petitioners rightly contend, and hence are preempted by the FAA. The application of the FAA and McCarran-Ferguson to determine preemption, and therefore the enforceability of arbitration agreements, should not be determined unilaterally by any one state either judicially pronouncing what is and is not "the business of insurance," or by using the term "insurance" in an anti-arbitration statute

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[12] *Knickerbocker Agency v. Holz*, 149 N.E. 2d 885 (1958); *Washburn v. Corcoran*, 643 F. Supp. 554. (S.D.N.Y. 1986); *Corcoran v. Ardra Ins. Co.*, 657 F. Supp. 1223 (S.D.N.Y. 1987); *Union Indemnity, et. al. v. American Centennial Ins. Co.*, 521 N.Y.S. 2d 617 (Sup. Ct. N.Y. County 1987); *Corcoran v. Ardra Ins. Co. Ltd.*, 156 A.D. 2d 70, 553 N.Y.S.2d 695 (1990); *Stephens v. American International Ins. Co., et al.*, 66 F.3d 41 (2nd Cir. 1995).

in order to statutorily create an artificial nexus. Such a determination must be made by a uniform federal standard.

CONCLUSION

The Reinsurance Association of America respectfully urges the Court to grant the petition for a writ of certiorari as sought by petitioners in this case.

Respectfully submitted,

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December 31, 2003

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No. 03-642

In The
Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., and COLORADO PERMANENTE MEDICAL GROUP, P.C.,

Petitioners,

vs.

KAREN PACHECO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Colorado

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF CIGNA HEALTHCARE OF CALIFORNIA, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

CIGNA HealthCare of California, Inc. (CHC) respectfully moves for leave to file the attached belated amicus curiae brief in this case. The consent of the attorney for petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

CHC has a direct interest in securing a decision by this Court that contractual arbitration agreements contained in health care plans will be enforced. CHC is a party in *CIGNA HealthCare of Cal., Inc. v. Balaban-Zilke*, Case No. 03-709, which raises the identical "reverse-preemption" issue presented by this case – whether the McCarran-Ferguson Act saves state laws that impose special requirements on arbitration agreements contained in health care plans from preemption by the Federal Arbitration Act. On January 12, 2004, this Court denied CHC's petition for writ of certiorari. CHC has sought rehearing of the denial of its petition based on the pending petition in this case. Moreover, the issues raised by petitioners have been and will continue to be raised in other litigation involving CHC.

Good cause exists for permitting this brief to be filed because it does not merely restate arguments presented by petitioners, but (1) demonstrates that the issue raised by this petition is a recurring "important question of federal law" that has been the subject of numerous conflicting opinions by federal and state courts; (2) amplifies the circuit conflicts identified in the petition involving application of the McCarran-Ferguson Act to save state statutes "enacted . . . for the purpose of regulating the business of insurance" from federal preemption; and (3) raises an

additional circuit conflict, not presented in the petition, regarding whether a federal law "specifically relates to the business of insurance" so that it can preempt contrary state insurance laws notwithstanding the McCarran-Ferguson Act.

CHC respectfully requests that this Court accept this belated amicus curiae brief because CHC did not recognize its significant interest in this petition for writ of certiorari until CHC's related petition was denied. By that time, the December 31, 2003 deadline for filing an amicus brief in this case had already passed. Neither party would suffer any undue prejudice if this brief is accepted for filing.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF CIGNA HEALTHCARE OF CALIFORNIA, INC.

INTEREST OF AMICUS CURIAE[1]

CIGNA HealthCare of California, Inc. (CHC)[2] is a California corporation that operates managed care networks facilitating the provision of medical and hospital services to eligible members. It does not itself treat patients, but merely administrates the payment of claims for health care services provided by doctors. Many of the health care plans offered by CHC contain arbitration provisions requiring the arbitration of all disputes relating to services provided under the plan.

California law, like the Colorado law at issue in this petition, imposes special restrictions on the enforcement of arbitration agreements contained in health care plans. *Compare* Colo. Rev. Stat. § 13-64-403 (2003) *with* Cal. Health & Safety Code § 1363.1 (West 2003). California courts, like the Colorado Supreme Court here, have refused to enforce contractual arbitration provisions that do not comply with state law. *See Balaban-Zilke v. CIGNA HealthCare of Cal., Inc.*, No. B140672, 2003 WL 21228038,

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or its counsel, make a monetary contribution to the preparation or submission of this brief.

[2] CIGNA HealthCare of California, Inc. is a wholly owned subsidiary of Healthsource, Inc. Healthsource, Inc. is a wholly owned subsidiary of CIGNA Health Corporation. CIGNA Health Corporation is a wholly owned subsidiary of Connecticut General Corporation. Connecticut General Corporation is a wholly owned subsidiary of CIGNA Holdings, Inc. CIGNA Holdings, Inc. is a wholly owned subsidiary of CIGNA Corporation. CIGNA Corporation is a public company, traded on the New York Stock Exchange and other exchanges. No single publicly held company owns 10% or more of the stock of CIGNA Corporation.

at *2-6 (Cal. Ct. App. May 28, 2003); *Allen v. Pacheco*, 71 P.3d 375, 377 (Colo. 2003). This Court recently denied CHC's petition for writ of certiorari in the *Balaban-Zilke* case. *See* Jan. 12, 2004 Order in Case No. 03-709. CHC's petition for writ of certiorari raised the identical "reverse preemption" issue as this petition – whether the McCarran-Ferguson Act saves state laws that impose special requirements on arbitration agreements contained in health care plans from preemption by the Federal Arbitration Act. CHC has a strong interest in securing a decision by this Court that contractual arbitration agreements contained in health care plans will be enforced. Moreover, the issues raised by petitioners have been and will continue to be raised in other litigation involving CHC.

CHC has sought rehearing of the denial of its petition for writ of certiorari in the *Balaban-Zilke* case based upon the pending petition in this case. *See, e.g., Simmons v. Sea-Land Servs., Inc.*, 462 U.S. 1114 (1983) (rehearing granted and case remanded in light of Supreme Court opinion in a related case).

LEGAL BACKGROUND

This case presents one of the most important issues facing the health care and insurance industries today: whether states can impose unique restrictions on the enforcement of mandatory arbitration provisions in health care plans.

Ordinarily, state laws imposing restrictions on arbitration agreements would be preempted by the Federal Arbitration Act. 9 U.S.C.A. § 2; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). In this past term,

this Court reiterated its "presumption in favor of arbitration." *PacifiCare Health Sys., Inc. v. Book*, 123 S. Ct. 1531, 1536 n.2 (2003). This Court also held that the terms "'involving commerce'" in the Federal Arbitration Act are "words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (2003).

However, the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C.A. § 1012(b). The McCarran-Ferguson Act was passed to reaffirm that states have primary regulatory control over insurance. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 40-41 (1996). In enacting the McCarran-Ferguson Act, "Congress was mainly concerned with the relationship between *insurance ratemaking* and the antitrust laws, and with the power of the States to tax insurance companies." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 458-59 (1969) (emphasis added). The purpose of the McCarran-Ferguson Act is "the avoidance of *'inadvertent* federal intrusion' into state insurance regulation," *Patenaude v. Equitable Life Assurance Soc'y of United States*, 290 F.3d 1020, 1026 (9th Cir. 2002), and it "is to be *'narrowly construed* in the face of valid federal regulatory interests.'" *Cochran v. Paco, Inc.*, 606 F.2d 460, 467 (5th Cir. 1979) (emphasis added).

In *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), this Court set forth a three-factor test for determining when a state law regulates

"the business of insurance" under the *second* clause of the McCarran-Ferguson Act applying to antitrust cases.[3] Since *Royal Drug* and *Pireno*, there has been a question in the lower courts as to whether this three-factor test applies in determining whether state laws were "enacted . . . for the purpose of regulating the business of insurance" pursuant to the *first* clause of the McCarran-Ferguson Act in non-antitrust cases. In *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), this Court observed that *Royal Drug* and *Pireno* did not completely determine the scope of the non-antitrust first clause of the McCarran-Ferguson Act.

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[3] The McCarran-Ferguson Act has two clauses that make reference to the "business of insurance." The first clause, applicable to non-antitrust cases, provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State *for the purpose of regulating the business of insurance.*" 15 U.S.C.A. § 1012(b) (emphasis added). The second clause, governing antitrust cases, provides that "the Act . . . known as the Sherman Act . . . and the Act . . . known as the Clayton Act, and the Act . . . known as the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *Id.* The three factors for when a state law constitutes the "business of insurance" under the second clause are "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

The petition for writ of certiorari raises the question whether the McCarran-Ferguson Act saves state laws that impose special requirements on arbitration agreements contained in health care plans from preemption by the Federal Arbitration Act. This Court should grant the petition.

First, the question presented by this petition is a recurring question in state and federal courts. Some courts have held that the Federal Arbitration Act preempts state laws that impose restrictions on arbitration agreements in health care or insurance plans, while other courts have held that the McCarran-Ferguson Act saves those state laws from preemption.

Second, as demonstrated by the petition, there is a circuit split regarding the correct interpretation of what constitutes a state law enacted "for the purpose of regulating the business of insurance" under the first clause of the McCarran-Ferguson Act. Some courts have held that the *Royal Drug* and *Pireno* three-factor test should still be utilized in first clause cases, while other courts have held that the test has no utility for first clause cases after *Fabe*. There is also an additional circuit split among those circuits that apply the *Royal Drug* and *Pireno* test in first clause cases regarding how broadly to apply the test.

Third, there is an additional circuit split, not addressed in the petition, regarding what constitutes a federal law that "specifically relates to the business of insurance" so that it can preempt contrary state insurance laws. Some courts have held that a federal law can be so

clearly meant to preempt any contrary state law – including insurance laws – that preemption may apply notwithstanding the McCarran-Ferguson Act even if the text of the federal statute does not refer to insurance, while other courts have reached the opposite conclusion.

LEGAL ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE CIRCUIT CONFLICTS OVER THE INTERPLAY BETWEEN THE MCCARRAN-FERGUSON ACT AND THE FEDERAL ARBITRATION ACT.

A. Numerous state and federal courts have reached conflicting decisions over whether the Federal Arbitration Act preempts state laws that impose restrictions on arbitration agreements in health care or insurance contracts.

Numerous states in addition to Colorado prohibit the enforcement of arbitration agreements in health care or insurance plans altogether, or impose special requirements on them before they can be judicially enforced.[4] These

[4] *E.g.*, Alaska Stat. § 09.55.535 (Michie 2003); Cal. Health & Safety Code § 1363.1 (West 2003); Colo. Rev. Stat. § 13-64-403 (2003); Ga. Code Ann. § 9-9-2(c)(3) (2003); Kan. Stat. Ann. § 5-401(c)(1) (2002); 710 Ill. Comp. Stat. Ann. 15/9 (West 2003); La. Rev. Stat. Ann. § 9:4235 (West 2003); Mass. Gen. Laws ch. 175, § 22 (2003); Me. Rev. Stat. Ann. tit. 24-A, § 2747 (West 2003); Mo. Rev. Stat. § 435.350 (2003); Nev. Rev. Stat. 689B.067 (2003); Ohio Rev. Code Ann. § 2711.23-2711.24 (Anderson 2003); Okla. Stat. tit. 15, § 802 (2003); R.I. Gen. Laws § 10-3-2 (2002); S.C. Code Ann. § 15-48-10 (Law Co-op. 2003); S.D. Codified Laws § 21-25B-3 (Michie 2003); Utah Code Ann. § 78-14-17 (2003); Vt. Stat. Ann. tit. 12, § 5653 (2003); Va. Code Ann. § 38.2-5803 (Michie 2003).

statutes have generated a wave of litigation over whether such restrictions on arbitration agreements in health care or insurance plans are preempted by the Federal Arbitration Act, which is designed to prevent states from imposing special rules on arbitration agreements that are not applied to contracts generally.

The courts that have considered the relationship between the McCarran-Ferguson Act and the Federal Arbitration Act are in conflict. Some courts have found that the Federal Arbitration Act preempts state laws that target arbitration agreements in health care or insurance plans[5] and other courts, like the Colorado Supreme Court

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[5] *E.g.*, *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 708-09 (5th Cir. 2002); *St. Paul Fire & Marine Ins. Co. v. Courtney Enters., Inc.*, 270 F.3d 621, 625 (8th Cir. 2001); *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 75-81 (1st Cir. 2000); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997); *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972-73 (9th Cir. 1992); *Life of Am. Ins. Co. v. Aetna Life Ins. Co.*, 744 F.2d 409, 411-13 (5th Cir. 1984); *Miller v. Nat'l Fid. Life Ins. Co.*, 588 F.2d 185, 187 (5th Cir. 1979); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971); *Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 610-11 (2d Cir. 1969); *Bullock v. United Benefit Life Ins. Co.*, 165 F. Supp. 2d 1259, 1261-62 (M.D. Ala. 2001); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 274-75 (D. Vt. 1993); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 750 F. Supp. 455, 459-62 (D. Kan. 1990), *rev'd*, 969 F.2d 931 (10th Cir. 1992); *Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52, 56-57 (W.D. Mo. 1985); *Bernstein ex rel. Comm'r of Banking & Ins. of the State of Vt. v. Centaur Ins. Co.*, 606 F. Supp. 98, 101-03 (S.D.N.Y. 1984); *Celtic Life Ins. Co. v. McLendon*, 814 So. 2d 222, 226 (Ala. 2001); *Am. Bankers Ins. Co. of Fla. v. Crawford*, 757 So. 2d 1125, 1131-36 (Ala. 1999); *Allen v. Pacheco*, 71 P.3d at 388 (Kourlis, J., dissenting) ("In short, I suggest that the interpretation the Majority affords the McCarran-Ferguson Act sweeps with a broad and wide arc that could swallow federal preemption under the Supremacy Clause."); *Towe, Hester & Erwin, Inc. v. Kan. City Fire & Marine Ins. Co.*, 947 P.2d 594, 597-99 (Okla. Ct. App. 1997);

(Continued on following page)

in this case, have found that such laws are saved from Federal Arbitration Act preemption by the McCarran-Ferguson Act.[6]

As stated by one of the commentators struck by the split among jurisdictions, "courts have reached differing conclusions over whether the McCarran-Ferguson Act precludes Federal Arbitration Act preemption." *See* Jennifer N. Taylor, *Recent Development:* Erickson v. Aetna Health Plans of California, Inc.: *When the Federal Arbitration Act Closes One Courtroom Door, Let the McCarran-Ferguson Act Open Another*, 28 W. St. U. L. Rev. 257, 272-74 (2000/2001); *see also* Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act – 1941-1993*, 43

Preziose v. Lumbermen's Mut. Cas. Co., 152 Vt. 604, 605-07, 568 A.2d 397, 398-99 (1989).

[6] *E.g.*, *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001); *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281-82 (10th Cir. 1998); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45-46 (2d Cir. 1995); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 934-35 (10th Cir. 1992); *Eden Fin. Group, Inc. v. Fid. Bankers Life Ins. Co.*, 778 F. Supp. 278, 282 (E.D. Va. 1991); *Washburn v. Corcoran*, 643 F. Supp. 554, 557-58 (S.D.N.Y. 1986); *Zolezzi v. PacifiCare of Cal.*, 129 Cal. Rptr. 2d 526, 539 n.11 (Ct. App. 2003); *Imbler v. PacifiCare of Cal., Inc.*, 126 Cal. Rptr. 2d 715, 717 (Ct. App. 2002); *Pagarigan v. Superior Court*, 126 Cal. Rptr. 2d 124, 134-35 (Ct. App. 2002); *Smith v. PacifiCare Behavioral Health of Cal., Inc.*, 113 Cal. Rptr. 2d 140, 142-44 (Ct. App. 2001); *Allen*, 71 P.3d at 377; *Cont'l Ins. Co. v. Equity Residential Props. Trust*, 565 S.E.2d 603, 604 (Ga. Ct. App. 2002); *Friday v. Trinity Universal of Kan.*, 939 P.2d 869, 872-73 (Kan. 1997); *In re Liquidation of Union Indem. Ins. Co. of N.Y.*, 521 N.Y.S.2d 617, 620-21 (N.Y. Sup. Ct. 1987); *Cox v. Woodmen of the World Ins. Co.*, 556 S.E.2d 397, 401-02 (S.C. Ct. App. 2001).

Cath. U. L. Rev. 399, 431-32 (1994). Another commentator, describing the split among the circuits, has noted that "Accepting certiorari on [*United States Department of Treasury v. Fabe*, 508 U.S. 491], the Supreme Court failed to define the relationship between the McCarran-Ferguson Act and the [Federal Arbitration Act]. . . . This lack of direction from the Supreme Court has led to a split in the circuits on the question of whether the [Federal Arbitration Act] applies to insurance contracts. The Tenth Circuit's decision marks a rare instance where other public policy concerns outweigh the presumption favoring arbitrability. [The Tenth Circuit's decision] further marks the rare instance where the presumption favoring arbitrability is overcome, not by a congressional command, but by judicial directive." Kristen Angus, *Tenth Circuit Surveys: Arbitration*, 76 Denv. U. L. Rev. 681, 692 (1999).

B. The circuits that apply the *Royal Drug* and *Pireno* test in non-antitrust first clause cases are split over how the test applies.

The petition for writ of certiorari and reply brief in support of the petition amply demonstrate that the lower courts are in conflict over when a state law has been "enacted . . . for the purpose of regulating the business of insurance." *See* Allen Pet. at 9-19; Allen Reply Br. at 3-8. The Third, Sixth, Seventh, and Ninth Circuits have held that *Fabe* does not abrogate the use of the three-factor test from *Royal Drug* and *Pireno* in non-antitrust cases. *E.g.*, *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 191 & n.3 (3d Cir. 1998); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 391-92 (6th Cir. 1994); *Am. Deposit Corp. v. Schacht*, 84 F.3d 834, 840 (7th Cir. 1996); *Merchs. Home Delivery Serv., Inc. v. Hall & Co.*, 50 F.3d 1486, 1490 n.2 (9th Cir. 1995).

Meanwhile the Eighth Circuit has held that in such cases, *Fabe* completely abrogates use of the three-factor test. *E.g.*, *Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1305 n.8 (8th Cir. 1997), *overruled on other grounds*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 305 n.6 & 314 (1999).

Even in those circuits that still utilize the *Royal Drug/Pireno* test in some manner for first clause cases, there is an additional circuit split over the degree of utility that test retains. The split centers on the question of whether it is relevant that the defendant's challenged conduct in the case actually constitutes the business of insurance, or whether McCarran-Ferguson reverse preemption is triggered so long as the particular state statute invoked by the plaintiff is intended to regulate the business of insurance.

Third Circuit: The Third Circuit has remarked on this circuit split: "We note at the outset that federal courts have seemingly disagreed as to the proper analytic inquiry into McCarran-Ferguson Act preclusion. . . . Some courts draw upon a four-part inquiry. . . . Other courts have announced a more truncated three-part test that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance." *Sabo*, 137 F.3d at 189 n.2.

Ninth Circuit: The Ninth Circuit employs a four-part inquiry to determine whether the McCarran-Ferguson Act precludes the preemption of a state insurance law by another federal statute in non-antitrust first clause cases: "(1) [the federal] statute does not 'specifically relate' to [the] business of insurance, (2) [the] acts challenged under the [state] statute constitute [the] business of insurance,

(3) [the] state has enacted a law or laws regulating [the] challenged acts, and (4) [the] state law would be superseded, impaired or invalidated by the application of [the] federal statute." *Merchs. Home Delivery Serv., Inc.*, 50 F.3d at 1489. The important aspect of this approach is the second factor, which requires that defendant's conduct itself constitutes the business of insurance.

Seventh Circuit: The Seventh Circuit directly challenges the Ninth Circuit's requirement that the defendant's conduct itself constitutes the business of insurance. Instead, the Seventh Circuit employs a three-part test that focuses on the purpose behind the state statute that is sought to be preempted: "first, does the federal statute at issue 'specifically relate to the business of insurance;' second, was the state statute 'enacted . . . for the purpose of regulating the business of insurance;' and third, would application of the federal statute 'invalidate, impair or supersede' the state law." *Autry v. Northwest Premium Servs., Inc.*, 144 F.3d 1037, 1040-41 (7th Cir. 1998).[7]

The Seventh Circuit rejects the Ninth Circuit's four-part test because "[t]he four-part test requires the court to examine the activity at issue to determine whether the activity being regulated is part of the 'business of insurance.' However, the statutory language counsels us to examine the *purpose for which the statute was enacted* to determine whether the statute is one 'enacted . . . for the

[7] The first and third parts of the Seventh Circuit's test are identical to the first and fourth parts of the Ninth Circuit's test. The split in authority centers around the difference between the Seventh Circuit's second part of the test and the Ninth Circuit's second and third parts of the test.

purpose of regulating the business of insurance.' While this distinction may seem somewhat semantic, the effect is far from inconsequential." *Id.* at 1041.

C. There is a circuit split, in addition to that identified by petitioners, over the determination of when a federal statute "specifically relates to the business of insurance."

1. This Court has not fully resolved the meaning of "specifically relates" as used in the McCarran-Ferguson Act.

Although not addressed by the petition, an additional circuit conflict is also implicated by this case – whether a federal law whose text does not refer to insurance, such as the Federal Arbitration Act, can be so clearly meant to preempt any contrary state law (including insurance laws) that preemption may apply notwithstanding the McCarran-Ferguson Act.

This court has only once addressed the meaning of the phrase "specifically relates" in the first clause of the McCarran-Ferguson Act, providing that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act *specifically relates to the business of insurance*." 15 U.S.C.A. § 1012(b) (emphasis added). In *Barnett Bank of Marion County, N.A.*, 517 U.S. 25, this court noted that "[t]he word 'relates' is highly general, and this Court has interpreted it broadly in other pre-emption contexts." *Id.* at 38. "'specifically' can mean 'explicitly, particularly, [or] definitely.'" *Id.* Applying that definition, this court found that a law that "grants national banks permission to 'act as the agent for any fire,

life, or other insurance company,' to 'solici[t] and sel[l] insurance'" *did* "specifically relate" to insurance. *Id.* at 39.

Barnett does not resolve the question implicated here, because the statute in *Barnett* involved a law that did refer to insurance in its text. *Barnett* thus left open the question of whether a federal law can be so clearly intended to preempt all contrary state laws, including those relating to insurance, that the McCarran-Ferguson Act does not apply regardless of whether the law refers to insurance in its text.

2. Some courts have held that a federal law can preempt a state insurance law even if the federal law does not refer to insurance in its text.

Second Circuit: The Second Circuit has interpreted the McCarran-Ferguson Act quite narrowly on this point. In *Spirt v. Teachers Insurance and Annuity Ass'n*, the court determined that Title VII applied to an insurance company and preempted a contrary state law even though Title VII did not specifically provide that it was meant to apply to insurance. 691 F.2d 1054, 1065-66 (2d Cir. 1982), *vacated on other grounds*, *Teachers Ins. & Annuity Ass'n v. Spirt*, 463 U.S. 1223 (1983), *reinstated on other grounds*, *Spirt v. Teachers Ins. & Annuity Ass'n*, 735 F.2d 23 (2d Cir. 1984). The court relied on the "broad and explicit preemption provision" contained in Title VII and on the fact that "Title VII is not being *construed* to *implicitly* pre-empt state laws." *Spirt*, 691 F.2d at 1065.

In *Stephens v. National Distillers and Chemical Corp.*, 69 F.3d 1226, 1231 (2d Cir. 1995), the court was confronted with the question of whether the McCarran-Ferguson Act precluded the Foreign Sovereign Immunities Act (FSIA)

from preempting a contrary state law. The court recognized that the state law in question regulated the business of insurance and that the FSIA did *not* refer to insurance in its text. *Id.* Nonetheless, the court held that the FSIA preempted the state law: "the McCarran-Ferguson Act does not preclude the preempting of New York's pre-judgment security requirement. The Supreme Court's language in *Fabe* in no way compels such a broad reading of the McCarran-Ferguson Act, while prior case law in this Court, at the very least, recommends a narrower reading of the statute." *Id.* The court recognized that where a federal statute has a "'broad and explicit preemptive provision'" and "wherever federal law clearly intends to displace all state laws to the contrary," then the McCarran-Ferguson Act provides no bar to the federal law's application to insurance even if there is not a specific reference to insurance made in the text of the statute. *Id.* at 1232-33; *see also Bernstein*, 606 F. Supp. at 101 n.6 ("The Second Circuit has found that the lack of an explicit reference to insurance in a federal law does not automatically place it within the McCarran-Ferguson Act."). In *Stephens*, the Second Circuit also reaffirmed its pre-*Fabe* holding in *Spirt v. Teachers Ins. & Annuity Ass'n. See Stephens*, 69 F.3d at 1233.

The Second Circuit has also held that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) is not reverse-preempted by the McCarran-Ferguson Act even though SLUSA does not refer to insurance in its text. *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 116-17 (2d Cir. 2001). In support of its holding, the court noted that "[i]t is only when a statute, by unintended implication, encroaches on the insurance regulatory regime of a state that McCarran-Ferguson prevents

application of the federal statute. . . . But when the intended effect of a federal statute is to displace state regulations, we must give effect to this intent, regardless of whether an insurance company is involved." *Id.* The court also noted that "Congress passed SLUSA to provide uniform, national standards for litigation concerning a defined set of nationally marketed securities . . . – a topic undisputably of national concern." *Id.* at 117.

Eleventh Circuit: The Eleventh Circuit has acknowledged the Second Circuit's conclusion that the McCarran-Ferguson Act does not apply to a federal law that is clearly meant to apply to insurance, even though it does not refer to insurance in its text: "[t]here has been some suggestion that the McCarran-Ferguson reverse preemption provisions should not apply in the context of the Bank Act, because the Bank Act was by its nature intended to preempt all conflicting state laws. In other contexts, federal laws involving issues of paramount national concern – such as the Foreign Sovereign Immunities Act (FSIA) and the Civil Rights Act of 1964 (Title VII) – have been held to be exempt from the reverse preemption provisions of McCarran-Ferguson." *Blackfeet Nat'l Bank v. Nelson*, 171 F.3d 1237, 1244 n.10 (11th Cir. 1999). The court ultimately found that the Bank Act did not rise to the same level of national concern as the FSIA or Title VII, but did not explain when a national policy embodied in a federal law becomes sufficiently important so as to preempt state laws notwithstanding the McCarran-Ferguson Act. *Id.* at 1244.

Other courts: Other courts have also found that federal statutes can apply to preempt contrary state insurance laws *notwithstanding* their failure to specifically refer to insurance. *E.g.*, *Md. Cas. Co. v. Cushing*, 347

U.S. 409, 422 (1954) (Federal Maritime Law); *Sears, Roebuck & Co. v. All States Life Ins. Co.*, 246 F.2d 161, 172 (5th Cir. 1957) (Lanham Act).

3. Other courts have held that if the text of a federal law does not refer to insurance, then it cannot "specifically relate to insurance."

Seventh Circuit: The Seventh Circuit has directly challenged the Second Circuit's decision in *Spirt* and has offered a broader reading of the McCarran-Ferguson Act: "'No Act of Congress' could not be more comprehensive. The McCarran-Ferguson Act creates a rule of construction applicable to all other federal laws, a 'plain statement' approach. . . . The second circuit [in *Spirt*] posed the wrong question when inquiring whether Congress meant to insulate the insurance business from civil rights laws. Congress did not tie its hands; instead it prescribed the consequences of silence and specificity in other acts past and future. . . . [F]ederal laws inconsistent with state laws apply when Congress says so directly." *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 294-95 (7th Cir. 1992). Consequently, the court held that Title VIII cannot preempt contrary state insurance laws because Title VIII does not specifically refer to insurance in its preemption provision. *Id.* at 295.

Fifth and Eighth Circuits: Other courts have also held that a federal statute that does not refer to insurance in its text cannot preempt any contrary state insurance laws because of the McCarran-Ferguson Act. *E.g.*, *Cochran v. Paco, Inc.*, 606 F.2d at 464 (Truth in Lending Act); *Murff v.*

Prof'l Med. Ins. Co., 97 F.3d 289, 291 (8th Cir. 1996) (Age Discrimination in Employment Act).

CONCLUSION

This case involves numerous circuit splits over important issues regarding the interaction between the McCarran-Ferguson Act and the Federal Arbitration Act. Accordingly, certiorari is warranted. Moreover, the McCarran-Ferguson Act and the Federal Arbitration Act are both important federal statutes which are frequent subjects of litigation in state and federal courts. The intersection of these two important federal statutes has caused tremendous difficulty in the lower courts, and it is incumbent on this Court to provide guidance to the lower courts on the questions presented by this petition.

Respectfully submitted,

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